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IN THE

Supreme Court of the United States

OCTOBER TERM—1956

No. ~~729~~ 72

STANISLAW NOWAK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GOODMAN, CROCKETT, EDEN & ROBB,
Counsel for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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IN THE

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OCTOBER TERM—1956

No.....

STANISLAW NOWAK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Eastern District of Michigan, Southern Division revoking and cancelling Petitioner's Certificate of Naturalization.

OPINION BELOW

A single opinion was rendered on November 26, 1956 by the Court of Appeals in this case and the case of *Maisenberg v. United States* (in which Petition for Certiorari also is being filed). The opinion does not appear to have been reported. A copy is included in the Appendix to this Petition (*infra* p. 4a).

The opinion of the District Court is unreported but is included in the Appendix to Appellant's Brief in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 26, 1956. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provisions of 28 U. S. C. Sec. 1254.

QUESTIONS PRESENTED

1. Does the "Affidavit of Good Cause" filed with the Complaint herein satisfy the requirements set forth by this Court in its opinion in *U. S. v. Zucca*, 351 U. S. 91?

2. Does the evidence establish the charge that Petitioner's naturalization was illegally or fraudulently obtained?

3. Is the Naturalization Court's Finding of Good Moral Character and Attachment subject to re-examination?

4. Was Petitioner deprived of his citizenship in violation of rights guaranteed him under the First and Fifth Amendments to the Federal Constitution?

STATUTES INVOLVED

At the time of Petitioner's naturalization in 1938 the Nationality Act of 1906, as amended (34 Stat. 596), was in effect.

Section 4, subsection (4) provided:

> "It shall be made to appear to the satisfaction of the Court admitting any alien to citizenship that * * * he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record." (34 Stat. 598, 8 U. S. C. 382.)

Section 7, provided:

> "That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist shall be naturalized or be made a citizen of the United States." (34 Stat. 598; 8 U. S. C. 364.)

And *Section 15* provided that:

> "It shall be the duty of the United States district attorneys for the respective districts or the Commissioner or Deputy Commissioner of Immigration and Naturalization upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." (8 U. S. C. 405, 34 Stat. 601.)

Subsequent to Petitioner's naturalization, the foregoing Sections of the 1906 Act, as amended, were repealed by the Nationality Act of 1940 (8 U. S. C. 907, etc. 54 Stat. 1137). The 1940 Act changed the above-quoted language of the behavior requirement of Section 4 of the 1906 Act so as to require a showing that the applicant "has been and still is a person of good moral character, attached to the principles of the Constitution of the United States * * *" (54 Stat. 1142; 8 U. S. C. 707).

It also expanded the belief requirements of the former law so as to preclude naturalization of any person:

(a) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government;

or

(b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates or teaches—

(1) the overthrow by force or violence of the government of the United States or of all forms of law;"

In addition, the 1940 Act also reenacted substantially the above-quoted Section 15 of the 1906 Act, as amended, authorizing cancellation of any naturalization certificate upon the grounds of fraud or illegal procurement. (54 Stat. 1158, 8 U. S. C. 738(a)). Subsection (g) of this section made this cancellation provision applicable "to any naturalization heretofore granted by any court."

STATEMENT

The present proceeding is pursuant to the cancellation provision of the 1940 Act.

Petitioner is a former Michigan State Senator. He was born in Poland in 1903. At the age of ten he came to the United States with his father and located in Chicago where he completed his highschool education.

At the age of 16 he began work as a newspaper reporter, and in 1924 he came to Detroit where for three years he edited a weekly labor newspaper in the Polish language.

In 1927 he returned to Chicago, and became active in the Amalgamated Clothing Workers Union of America.

He returned to Detroit in 1932, obtained employment as an autoworker, married a native American and has resided with his wife and their daughter in Detroit ever since.

In 1936 Petitioner became an organizer for the United Automobile Workers Union; and on June 13, 1938 he became a naturalized American citizen by order of the United States District Court at Detroit.

In November, 1938, five months after his naturalization, Petitioner was elected to the Michigan State Senate on the Democratic ticket. (Michigan Official Directory and Legislative Manual for 1941 (p. 667).) He was reelected each two-year period until 1948. Petitioner has no criminal record.

At the November Term, 1942 of the Federal Grand Jury at Detroit, he was indicted upon an indictment alleging the same charge (i.e., swearing falsely in his naturalization proceeding) as that set forth in the present proceeding. Subsequently, and on February 8, 1943, and on motion of "the Attorney General of the United States," an order of *nolle prosequi* was entered upon that indictment. (Docket No. 26899, U. S. D. C., E. D. Mich., S. D., Moinet, D. J.)

The present denaturalization proceeding against Petitioner was instituted on December 23, 1952.

The Pleadings.

The Complaint, as amended (App. 2a),[1] alleges that the Petitioner made four false representations in the course of his naturalization proceeding:

First: That in the oral examination on his Petition for Naturalization, Petitioner was asked and falsely denied membership in the Communist Party.

Second: That Petitioner answered falsely to the following questions in his Preliminary Form of Petition (see App. 19a):

"(23) Do you fully believe in the form of government of the United States? *Yes.*"

"(28) Are you a believer in anarchy? *No.* Do you belong to or are you associated with any organization which teaches or advocates anarchy or the

[1] "App. 2a" refers to the printed Appendix filed with the Appellant's Brief in the Court of Appeals.

overthrow of existing government in this country? *No.*"

Third: That the following statement in his Petition for Naturalization was false (See App. 22a):

"(7) I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty * * *."

Fourth: That the following oath taken by Petitioner in open Court was false:

"That he would support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion."

The Complaint further charged that Petitioner lacked the requisite "good moral character" and was not attached to the principles of the Constitution at the time of his naturalization. Cancellation of his naturalization was requested upon both of the statutory grounds—fraud and illegal procurement.

Attached to and made a part of the Complaint is the affidavit of one Reuben Speiser, an attorney for the Immigration and Naturalization Service, United States Department of Justice. The affidavit states that affiant "has ac-

cess to the official records of the said Service from which the following facts appear:" The affidavit then sets forth the date and place of Petitioner's naturalization, the foregoing answers given by Petitioner in the course of his naturalization, and charges that such answers were false (App. 8a).

The affidavit further charges that Petitioner was "an active member of the Communist Party of the United States from about 1935 until the date of his naturalization and has continued such membership until the present time" (App. 9a).

The affiant then avers (in the statutory language of the Nationality Act of 1940, notwithstanding Petitioner was naturalized in 1938) that Petitioner and the Communist Party, "at all times mentioned herein," engaged in conduct allegedly proscribed by the 1940 Act; "that the Communist Party of the United States was a section of an international organization whose principal officers were citizens" of the Soviet Union and "that decisions made by such organization were binding upon * * * the Communist Party of the United States and the members thereof * * *." (App. 10a); that Petitioner "at all times since 1935" bore allegiance to the Soviet Union, and that he "intentionally and deliberately made false statements" in his naturalization proceeding "in order to prevent * * * a proper investigation of his qualifications for citizenship;" and "to conceal his lack of attachment * * * and to procure naturalization in violation of law."

The affidavit then sets forth (App. 11a) the conclusion that Petitioner's naturalization "was illegally and fraudulently procured;" that Petitioner lacked good moral character and attachment by reason of his alleged Communist Party membership and the allegedly false answers given in his naturalization papers; and "that good cause exists

for the institution" of a denaturalization proceeding against Petitioner.

Petitioner's Answer (App. 15a) admitted the execution and filing of the above mentioned naturalization forms, the taking of the oath, and the grant of naturalization. It denied that the answers given or the oath taken were false; and it denied the allegation of Communist Party membership.

The Answer also challenged the sufficiency of the *Speiser* affidavit, alleging that the same is "based upon hearsay," sets forth "conclusions" and "is not in the form required by law."

Additionally, the Answer alleged the following as special defenses and moved for dismissal of the Complaint:

> (a) That the institution of this proceeding ten years after the dismissal of an indictment based upon identical charges constitutes an abuse of the process of the Court and a denial of due process.
>
> (b) That Section 338(a) (8 U. S. C. Sec. 738(a)) of the Nationality Act of 1940 [under which the suit is brought] on its face, and as applied to Petitioner, is unconstitutional under the First and Fifth Amendments to the Federal Constitution.
>
> (c) That the judgment of naturalization is *res judicata* as to all issues determined thereby.

The Evidence

The Government called twelve (12) witnesses, two of whom were naturalization examiners. Both examiners were extremely positive in their recollection that at the time of his naturalization interview in 1938, Petitioner was asked by them and gave a negative answer to the question: "Have you ever been a member of the Communist Party?"

Examiner Hart said that he was aware of speeches and other union activity by Petitioner in connection with the 1936 sit-down strikes in the automobile industry (Trial Tr. p. 77); that he was of the opinion that these sit-down strikes represented Communist Party attempts "to gain their first foothold in this country" (Trial Tr., p. 87); and that he "felt because Mr. Nowak had participated in such a strike that that in [Hart's] mind was a link between [Nowak] and the Communist Party."[2]

Examiner Smiley testified that on the morning of the day Petitioner was to appear for questioning, he (Smiley) was asked by someone: "Did you know Mr. Nowak is in this morning?" "Did you know he is a Communist?" (Trial Tr. 133). Also, that Petitioner's name had frequently appeared in the public press in connection with labor activity.

The Trial Court, however, expressly declined (App. 26a-27a) to find that Petitioner had been asked by either examiner whether or not he was or had been a Communist Party member. He found no reference in their notes that such an inquiry was made (App. 26a-27a).

The testimony of one other Government witness, Thaddeous Zygmont, also was discredited by the Trial Court and "completely ignored" (App. 28a), notwithstanding that, on cross-examination, this witness' testimony (See *infra*, p. 34) tended to refute the contention that the Communist Party, in the period in question here, advocated the violent overthrow of the government.

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[2] Cf. Examiner's notations on Petitioner's Petition for Naturalization (App., 2.23a, lower right corner) which indicate a thorough examination of Petitioner's labor activity.

The testimony of the nine (9) other witnesses called by the Government is thus summarized by the Government in its Brief (p. 5) filed in the Court of Appeals[3]

> "To prove the appellant's membership in, knowledge of, and activities in the Communist Party, the Government introduced nine witnesses. One additional witness, Baxter, testified as to the aims and objectives of the Communist Party after being qualified as an expert witness in regards to those aims and objectives. In addition to the oral testimony of the witnesses, the Government introduced fourteen books and pamphlets which were literature used and distributed by the Communist Party during the period of appellant's membership therein.[1]"

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[1] (a) "The Communist Manifesto", by Carl [sic] Marx and Frederick Ingals [sic], by International Publishers, Inc.;

(b) "State and Revolution", by V. I. Lenin, copyrighted 1932 by International Publishers, Inc.;

(c) "Left Wing Communism and Infantile Disorder" [sic], by V. I. Lenin, copyrighted by International Publishers, New York, 1940;

(d) "Program of the Communist Internationale", copyrighted by Workers Library Publishers in 1929, third edition printed in February, 1936;

(e) "Foundations of Leninism", by Joseph Stalin, copyrighted in 1939 by International Publishers, Inc.;

(f) "The Communist Party. A Manual on Organization", by J. Peters, published in 1935 by the Workers Library Publishers;

(g) "The Struggle Against Imperialist War and the Tasks of the Communists", published by Workers Library Publishers, second edition of July, 1934;

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[3] Petitioner does not concede the correctness of this summary. It is quoted here merely as presenting the evidence in a manner which the Government obviously deemed most favorable to its contentions.

(h) "Why Communism", by M. J. Olgin, published by Workers Library Publishers, December 1933;

(i) "Why Every Worker Should Join the Communist Party", published by Workers Library Publishers, Inc., no printing date being shown;

(j) "Problems of Leninism", by Joseph Stalin, copyrighted in 1934 by International Publishers Company, Inc.;

(k) "The Ultimate Aim", copyrighted in 1935 by International Publishers Company, Inc.;

(l) "Report to the Eighth Convention Communist Party", by Earl Browder, 1934, published by Workers Library Publishers;

(m) "Resolutions of the Seventh Congress of the Communist Internationale", published in 1935, Workers Library Publishers;

(n) "The Twenty-One Conditions of Admission into the Communist Internationale", by O. Piatnitsky, published by Workers Library Publishers.

[There was no evidence connecting Petitioner with any of these documents.]

"Witness Nowell was qualified as an expert on the aims and objectives of the Communist Party in addition to his identification of appellant as a member of the Communist Party."

"Baxter and Nowell both testified that they attended the Lenin Institute in Moscow, [in 1931] a school conducted by the Communist International of which the Communist Party of the United States was a Section, and both testified that they were taught that the ultimate aim and objective of the Communist Party of the United States is the overthrow of this Government by force or violence. They were taught that the Communist Party of the United States was bound by the decisions of the Communist International. They were taught the science of civil warfare designed to destroy our government and to establish a dictatorship for the

proletariat. They testified that they taught in Communist Party schools and at Communist Party meetings that the objectives of the Communist Party of the United States was the overthrow of this government by force and violence."

* * * * *

"In addition to testifying that the aims and objectives of the Communist Party of the United States were the forceful overthrow of the Government of the United States, witness Nowell testified that he had attended several closed meetings of the Communist Party from 1935 through 1936 with the appellant, in addition, he had solicited Nowak's membership in the Communist Party and was present at appellant's induction. Witness Nowell further testified that the appellant 'eventually came over wholeheartedly and became a member of the Communist Party' (T. 457) and that on the occasion of appellant's induction into the Communist Party in September 1935 that the appellant 'made a brief analysis of capitalism and the conditions under which the Communist Party operated' (Appellant's brief, p. 46), and thereafter the appellant 'pledged his allegiance to the leadership, program, policies, and premises of the Communist Party of the United States and Communist International at that meeting following his induction by William Weinstone.' "

"Witness Budenz testified that he was a member of the National Committee of the Communist Party and also editor of the Daily Worker, whose duties were to edit the paper in such a way that it would precisely give directives to the Communists throughout the country. Budenz first met the appellant in Chicago, the latter part of 1937 or 1938, at a Communist Party meeting of midwest functionaries who met in order to advance the Midwest Daily Record, which was the official Communist Party organ at that time."

"Jack Stachel, who Budenz described as 'the most important member of the Politburo' (T. 966) introduced the appellant to Budenz as 'a valuable member of the party'" (T. 967).

"Budenz further testified that he attended several enlarged National Committee meetings of the Communist Party in New York City with the appellant. The first in the latter part of 1938 or 1939 and two in the forties. Budenz also testified that he discussed the fact that appellant was running for the State Legislature at a district bureau meeting of the Communist Party in Detroit on the occasion of one of his visits in 1938 or 1939. That the discussion was as to the mobilizing of the Communist Party to support him in the elections that were to take place (T. 974). Budenz described appellant as an important functionary of the Communist Party and stated that on occasion he discussed with appellant the opportunities of the Communist Party to obtain influence as a result of the war situation" (T. 977).

"Defense Exhibit 7 'Men Without Faces' was introduced and in it Witness Budenz, the author, is quoted as saying that he ran into many surprising faces, surprising that is, in that the public would not have suspected them to be seen in such a place (Communist Party Headquarters in New York on the ninth floor).

> 'Up there too I ran into Senator Stanley Nowak of Michigan, at the time when he was denying all relationship with the Communist Party but when I knew him to be taking orders from the Party leaders '" (T. 989).

"Doctor Hewitt testified that he was a research scientist and teacher at the Des Moines Still College of Osteopathy and Surgery in Iowa, and joined the Communist Party in late 1936 in Chicago, Illinois. In September 1938, Doctor Hewitt

became an instructor in physiology at Michigan State College, located in Lansing, Michigan. He was instructed by the Communist Party to reconnect with the Communist Party in Michigan through the appellant (T. 563).

"After testifying that he had attended closed meetings of the Communist Party with the appellant and collected dues from the appellant and had paid dues to the appellant, and had worked with the appellant in establishing a Communist Party unit at Michigan State College, Doctor Hewitt further testified that

> "I was told that Stanley Nowak was, because of his position in the Michigan State Legislature, a secret Communist; and I wasn't to go running to him when I had any little problem; * * *. That we shouldn't expect him to attend meetings that we were not to get in touch with him at the Capitol in the Legislature' " (T. 575).

"A summary of the additional witnesses' testimony is found in the Opinion of the Court and will not be discussed further here (Appellant's Appendix 28a-29a)."

Counsel's reference to the Trial Court's opinion refers to the Court's following summary of the testimony of the remaining five Government witnesses:

> "Witness Fountain—Attended closed Communist Party meetings in Detroit with Nowak from June 1937 through 1938; knew Nowak to be a Communist Party member; attended Communist Party schools where Nowak lectured on 'Strategy of the Communist Party in relation to labor, and rise of Hitler.' ".
>
> "Witness Eager—Nowak solicited Eager's membership in Communist Party in 1937; knew Nowak was a Communist Party member and attended

many closed Communist Party meetings from 1937 through 1938."

"Witness Reno—Knew Nowak to be a Communist Party member from July or August 1937 to December 1938; attended functionary meetings with Nowak; closed Communist Party meetings and an enlarged National Committee meeting in December 1938 with Nowak. Also saw his Communist Party card."

"Witness Rataj—Attended one closed Communist Party meeting with Nowak in fall of 1937."

"Witness Herbster—Attended one closed Communist Party meeting with Nowak in summer of 1937."

Petitioner was not called to the stand by the Government and offered no testimony at the trial.

The Opinions Below

The Trial Court held that the validity of Petitioner's naturalization must be determined by the Nationality Act of 1906, as amended, in effect at the time of Petitioner's naturalization; that the "belief" proscriptions in that Act were directed "at polygamists and anarchists" and "that nothing contained in Section 7" of that Act "barred naturalization of one because he was a member of the Communist Party" (App. 25a). However, the Trial Court concluded that Petitioner was a member of the Communist Party at the time of his naturalization and knew that the organization advocated "the overthrow of this Government by force and violence" (App. 32a); that he intentionally concealed his Communist Party membership when he answered Question No. 28 and at the time he swore allegiance; and that this concealment, together with the

nature of the organization, marked Petitioner as a person lacking in good moral character and attachment to the Constitution (App. 32a-33a).

The order of cancellation, based upon a finding of fraud and illegal procurement, was entered on August 9, 1955.

The Court of Appeals, affirming the Trial Court, held that all of the legal issues presented (except as to the sufficiency of the affidavit of good cause) "have been adjudicated adversely" to Petitioner by the prior opinions of the Court of Appeals wherein that Court had cited the Supreme Court's holding in *Knauer v. United States*, 328 U. S. 654; *United States v. Ginsberg*, 243 U. S. 472; *Schneiderman v. United States*, 320 U. S. 118; and *Dennis v. United States*, 341 U. S. 492. It concluded that the District Court's findings "were not clearly erroneous" and that its conclusions of law were "supported by the highest authority."

The Court of Appeals also held that the affidavit of good cause here "was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case" (351 U. S. 91).

REASONS FOR GRANTING THE WRIT

There is a prevailing aura of uncertainty which surrounds this Court's holding in *United States v. Zucca*, 351 U. S. 91; and there also is an increasingly prevalent notion that "recent statements by the Supreme Court clearly point out that all that is left of the *Schneiderman* case (320 U. S. 118) is the rule as to *quantum* of proof."[4]

(1) The writ should be granted here to remove these doubts; to make clear the meaning of the requirement in

[4] So stated by the Government in its Brief (p. 43, 49) below.

Zucca that there must be an affidavit setting forth "evidentiary" matter as a precondition to the institution of a denaturalization suit; and to assess and determine the true limits of the impact of this Court's several recent holdings concerning the character of the Communist Party in the post-1940 period (Cf. *Harisiades v. Shaughnessy*, 342 U. S. 580), or post-1945 period (*Dennis v. United States*, 341 U. S. 494; *Carlson v. Landon*, 342 U. S. 524 and *American Communications v. Douds*, 339 U. S. 382) with its prior holdings in *Schneiderman*, and the legal effect of these holdings upon naturalization granted in the pre-1940 period.

(2) The writ should be granted to determine, what was left undetermined in *Schneiderman*, what was distinguished by this Court in *Knauer v. United States*, 328 U. S. 654, and what was left unclear in *Baumgartner v. United States*, 322 U. S. 665, namely, the allowable extent to which findings of "good moral character" and "attachment," judicially arrived at on the basis of evidence presented to the naturalization Court in an adversary proceeding, may nevertheless be reviewed and set aside years later in a denaturalization suit such as the instant proceeding.

(3) And, finally, the writ should be granted to determine the constitutionality of the proscription (in Question 28 of the Petition for Naturalization herein) against membership in organizations which teach or advocate "the overthrow of existing government in this country," in the light of the fact that such a proscription is not expressly authorized by the 1906 Act, as amended; and, if inferred, is in conflict with this Court's decisions holding that: (a) aliens are protected by the First Amendment (b) the First Amendment will not permit proscription of advocacy of peaceful overthrow; and (c) First Amendment rights can be circumscribed only where the speech or conduct is an "incitement to action" and presents "a clear and present danger of substantive evil."

Thus, this case not only presents questions of Federal law of great legal and public importance which should be settled by this Court but the Court of Appeals has decided these important questions in a way which conflicts with constitutional principles and applicable decisions of this Court, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power and supervision.

I.

THE AFFIDAVIT OF GOOD CAUSE FILED WITH THE COMPLAINT HEREIN DOES NOT SATISFY THE REQUIREMENTS SET FORTH IN UNITED STATES v. ZUCCA, 351 U. S. 91

Ever since the opinion of this Court in the *Zucca* case, 351 U. S. 91, 76 S. Ct. 671, the District Courts have struggled with the question of the sufficiency of the required affidavit of good cause in denaturalization proceedings. Such questions as the following have been raised and are pending in the various District Courts. Who is competent to make such affidavit? What is the nature of the "evidentiary matters" which must be set forth in such affidavit? Is an affidavit sufficient which merely sets forth the conclusions reached by an immigration officer after his review of unidentified "official records" of the immigration service? Is the affidavit "jurisdictional" in the sense that, absent a sufficient affidavit, the District Court lacks jurisdiction to proceed with the cause? *United States v. Kaplan*, unreported, U. S. D. C. Conn., No. 3509 Civil, May 4, 1956; *United States v. Costello*, unreported, S. D. N. Y. No 70-309, May 21, 1956; *United States v. Chandler*, unreported, D. Me., No. 7447 Civil, June 27, 1956.[5]

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[5] These questions are awaiting determination in several denaturalization cases now pending in the District Court below.

Apparently, the decision in *Zucca* has left the answer to these questions in substantial doubt. The minority opinion there, however, (if its conclusion as to the import of the majority opinion is valid) appears to have resolved these doubts in favor of Petitioner's contentions here.

In *Zucca*, the majority ruled in the penultimate sentence of its opinion (76 S. Ct. 26 677):

> "We believe that, not only in some cases but in all cases, the district attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause."

Petitioner contends that this holding clearly indicates that a legally sufficient affidavit is a jurisdictional requirement.

The majority also made a distinction between the allegations to be made in the bill of complaint and the facts to be set forth in the required affidavit (76 S. Ct. 676):

> "The complaint, under modern practice, is required merely to allege utlimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship."

Finally, the majority in *Zucca* emphasized that, notwithstanding the complaint there was verified by an Assistant United States Attorney and no part of it was alleged on information and belief, nevertheless this Assistant United States Attorney subsequently filed an affidavit stating that he had no personal knowledge of any of the facts set forth in the complaint and that his only knowledge or information was obtained by him "through files turned over to him for use in preparation of the complaint" (76 S. Ct. 673, note 4).

Petitioner contends that this reference by the majority in *Zucca* indicates that an affidavit not based upon personal knowledge is legally insufficient.

The dissent in *Zucca* interpreted the above views of the majority to mean "As petitioner contends, 'good cause' means that the government must furnish the Court with sworn statements by persons having personal knowledge of the facts;" and that, "Apparently neither the United States Attorney nor anyone in the Immigration Service or the F. B. I. can make such an affidavit unless he has personal knowledge of the facts." The dissent was of the view that:

> "At most it should be sufficient for an officer of the Immigration and Naturalization Service familiar with the case to make such allegations under oath."

In the present case it is apparent that the Court of Appeals accepted this minority view in *Zucca* and disapproved of the majority view. The Court of Appeals specifically held:

> "In our judgment, the affidavit of an attorney of the Immigration and Naturalization Service of the United States Department of Justice reciting facts appearing in the official records, such as the affidavit filed in each of these cases, was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case."

This, we think, is an incorrect reading of *Zucca* for the following reasons:

First: The legal effect of the verified complaint in *Zucca* and the subsequent affidavit of the Assistant United States Attorney, places *Zucca* on "all fours" with the instant case with respect to the affidavit requirement. In each

instance the verified allegations are merely conclusions reached by the affiant from his examination of unidentified "files" or "official records" of the Service. The majority in *Zucca* held that this was not sufficient because it did not set forth "evidentiary matters showing good cause for the cancellation of citizenship." The Court of Appeals here reaches the opposite conclusion.

Second: The majority in *Zucca* makes it clear that the affidavit must be "evidentiary" in substance and not merely in form. To be "evidentiary," what is asserted must be presented by a witness who is competent and must be of a quality that would be admissible at the trial of the cause. For in *Zucca* the complaint was, so far as the form of the allegations are concerned, at least as "evidentiary" as the affidavit in this case. For example, what could be more "evidentiary" in form than paragraph 7 of the *Zucca* complaint, which alleged "that the said defendant was a member of the Communist Party of the United States * * * from 1925 to 1947?" Nevertheless, the majority in *Zucca* held this sworn allegation to be insufficient. The reason, as footnote 4 to the majority opinion makes clear, was that the assertion represented the affiant's conclusions and was not based upon his personal knowledge. As such it was hearsay—perhaps two or three times removed—and not admissible at the trial of the cause. Thus the Court of Appeals here has accepted precisely what was rejected by this Court in *Zucca*.

Third: The acceptance by the Court of Appeals of the affidavit here is contrary to the spirit and intent of the affidavit requirement as explained by the majority in *Zucca*. For in *Zucca* this Court stated (76 S. Ct. 676):

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defend-

> ant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provded that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded."

Yet, what is it but a "light regard" for the affidavit requirement, if a hearsay-on-hearsay affidavit is accepted? And how can a summary of some unidentified file material actually show "good cause" merely because the summary is notarized? For all that appears from the affidavit here, "the official records of the Service," which the affiant purports to have consulted, may be no more than "information acquired * * * from looking at hearsay statements in a F. B. I. dossier." (*Klapprott v. U. S.* 335 U. S. 601, at 610.)

Fourth: The Government argued below that a criminal indictment may be founded upon hearsay. The dissent in *Zucca* argues the same analogy (76 S. Ct. 676). But this is true of indictments, for historical reasons, because of the public policy inherent in not exposing grand jury proceedings to public scrutiny. In denaturalization cases a different public policy (as indicated in *Zucca*) has been announced by Congress.

Fifth: The correct analogy is not to indictments; rather, it is to other situations in which an affidavit of cause is required as a prerequisite to legal action. Thus, Title 18 U. S. C., Sec. 3182, requires that before extradition may be ordered there must be presented "an affidavit made before a Magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime." The Courts almost uniformly have

held that such an affidavit must state facts of the affiant's own knowledge which would be admissible as evidence and sufficient to warrant a finding of probable cause of commission of the offense by the accused. *Rafferty ex rel. Huie Fong v. Bligh*, 55 F. 2d 189, 194; *U. S. ex rel. McCline v. Meyering*, 72 F. 2d 716; *Ex Parte Morgan*, 20 Fed. 298; *Riley v. Colpsys*, 85 F. 2d 282; and *People v. McLaughlin*, 243 N. Y. 147, 153 N. E. 853.

Again, the Fourth Amendment to the Federal Constitution provides that "no warrants shall issue, but upon probable cause supported by oath or affirmation." Controlling judicial authority holds that the good cause affidavit for issuance of a warrant must be on personal knowledge and not on information and belief. *Sutherland v. U. S.*, 92 F. 2d 305; *Simmons v. U. S.*, 18 F. 2d 85; *Reeve v. Howe*, 33 F. 2d 619; *U. S. v. Reynolds*, 111 F. 2d 589; *U. S. v. Office Number 508 Ricond-Brewster Building*, 119 F. 2d 24; *Nathanson v. U. S.* 290 U. S. 41; *U. S. v. Hall*, 114 Fed. Sup. 441; and *U. S. v. Kennedy*, 5 F. R. D. 310.

Finally, analogous authority may be found in the decisions interpreting Rule 3 of the Federal Rules of Criminal Procedure which Rule provides: "A complaint • • • shall be made upon oath before a Commissioner or other officer empowered to permit persons charged with offenses against the United States." It is generally held that such a complaint by a United States Attorney not based on personal knowledge (*U. S. v. Baumert*, 179 Fed. 735, and *U. S. v. Langsdale*, 115 F. Sup. 489) or merely reciting that the allegations are based on "official investigation" (*U. S. v. McCunn*, 40 F. 2d 295) is insufficient to support the issuance of a warrant under the above Rule.

II.

THE EVIDENCE FAILS TO ESTABLISH THE CHARGE THAT PETITIONER'S NATURALIZATION WAS ILLEGALLY OR FRAUDULENTLY OBTAINED

We assume here, solely for purposes of our argument, that so much of the finding below as holds (App. 27a) that Petitioner was a member of the Communist Party from 1935 to "at least through 1937 and 1938" is supported by this record.

At least three primary elements must converge before a claim of fraud is established. There must have been (1) a misrepresentation (or concealment) of (2) a material fact with (3) knowledge of its falsity. Thus, if the finding of fraud is to be sustained here, it must appear from the record by "clear, convincing and unequivocal" evidence that:

1. Communist Party membership was material on the issue of Petitioner's naturalization;
2. Petitioner misrepresented (or concealed) his alleged Communist Party membership by giving a negative answer to Question 28; and
3. Petitioner must have known that his negative answer to Question No. 28 was false.

(1) Communist Party Membership Was Immaterial to Naturalization under the 1906 Act.

The 1906 Act, as originally enacted, (34 Stat. 597) required the petitioner to state that he was not "a disbeliever in or opposed to *organized government*, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized *government* * * *" (53 Stat. 843-844). Subsequent amend-

ments to the 1906 Act, prior to 1940, did not affect this requirement, and this was the belief requirement for naturalization at the time of Petitioner's naturalization in 1938.

The statutory form of Declaration of Intention set forth in the 1906 Act required Petitioner to affirm "I am not an anarchist." And the form of the Petition required that he state:

> "I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government."

As we have seen (*supra*, p. 3-4), the Nationality Act of 1940 (54 Stat. 1137; 8 U. S. C. 907) made the first substantial changes in the belief requirements for naturalization. Section 305 of that Act, in addition to disqualifying those who were "opposed to organized government", provided for the disqualification of those who believe in or were members of organizations which advocate "the overthrow by force and violence of the government of the United States."[6]

Thus, a comparison of the language of the 1906 Act and the subsequent 1940 Act makes it apparent that the belief qualifications applicable under the 1906 Act at the time of Petitioner's naturalization in 1938, were addressed at anarchists and included neither Communists by name nor believers in "the overthrow of existing government in the United States."

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[6] This Court, however, has held that this change in the belief requirements under the 1940 Act did not exclude Communist Party members, *per se*, from naturalization. See *Schneiderman v. United States*, 320 U. S. 118, note 8 on page 132 and note 53 at page 159.

The Internal Security Act of 1950 was the first Congressional enactment barring "Communists" as such from citizenship. 64 Stat. 1015.

This conclusion is confirmed by the legislative history of attempts to amend the 1906 Act so as to bar Communists or advocates of "overthrow by force and violence of the Government of the United States." (See *Schneiderman*, note 8, page 132. See also Report No. 1923 accompanying H. R. 7120, 74th Congress, 1st Session, May 27, 1935; and remarks of Mr. Rees of Kansas for the House Committee on Immigration, 86 Cong. Rec. 11942; 11949.)

It is significant, too, that while Congress did amend the deportation laws in 1918 so as to exclude not only aliens who are "opposed to organized government" but also those who teach and advocate "the overthrow by force and violence of the Government of the United States or of all forms of law" (41 Stat. 1008), no such provision was enacted with respect to naturalization.

The obvious conclusion is that Congress was aware of the distinction between these concepts[7] and did not regard Communist Party membership, nor advocacy of overthrow of the government, as material to naturalization in 1938 when Petitioner was naturalized.

The record here, in two instances, establishes affirmatively that the Immigration Service *in 1938* did not regard such membership as material.

First, as we have noted above, each of the Immigration Examiners testified to suspicions that Petitioner was a Communist; they regarded him as a labor agitator associated with sit-down strikes; they were "primed" for

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[7] For a judicial recognition of the distinction between advocacy of anarchy and advocacy of communism, see the dissent by J. Pound, concurred in by J. Cardozo in *People v. Gitlow*, 234 N. Y. 132. The question was not considered on the later Supreme Court review in *Gitlow v. New York*, 268 U. S. 652. See also *Encylopedia Brittanica*, 12th ed. 1926, Vol. 1, pp. 692; "* * * Communism in its form is closely allied to syndicalism but not to anarchism as is often falsely maintained."

him (App. 26a). They did not, however, think Communist membership material to naturalization; otherwise they would have asked him to confirm or deny such membership. Instead, as their notations on his Petition show, they inquired into his labor activities and beliefs—perhaps because at that time (1938) the idea was currently held that all labor "organizers" were "radicals."

Second, the identical charge now made against Petitioner—falsely swearing in connection with his naturalization—was pressed by the Government to a criminal indictment of Petitioner in 1941 for perjury. Presumably the Government made a thorough investigation. Nevertheless, this indictment was never brought to trial and ultimately was dismissed on motion made by the Attorney General of the United States. The Immigration Service, then under the Attorney General must have known or had reason to believe for some ten years prior to the bringing of this denaturalization proceeding, that evidence was available from which it might be concluded that Petitioner at the time of his naturalization was a member of the Communist Party. The failure of the Service to act upon this information for ten years is potent proof that it did not regard Petitioner's alleged Communist Party membership, nor the character of that membership, nor the character of that organization at the time, as material on the issue of Petitioner's naturalization.

It follows that the first requirement for a finding of fraud is not established here.

(2) There Was No Concealment nor Misrepresentation by Petitioner.

In addition to materiality, the fact upon which a charge of fraud is predicated must have been wilfully misrepresented or intentionally concealed.

The Court below, after expressly finding that Petitioner was not specifically asked concerning alleged Communist Party membership (App. page 26a), concluded, nevertheless, that Question No. 28 contained in his Preliminary Form of Petition should have been interpreted by Petitioner as an inquiry concerning Communist Party membership and should have evoked from Petitioner an admission of such membership (App. 32a-33a). This requires a consideration of the meaning a reasonable man would be expected to give to Question No. 28 in 1938.

Question No. 28 is in two parts, each of which Petitioner answered in the negative. The first inquiry: "Are you a believer in anarchy?" refers to the applicant's individual political beliefs. Since, as we have seen, a belief in Communism or a belief in overthrow of the government in this country, is not to be equated with a belief in anarchy, this first inquiry of Question No. 28—"Are you a believer in anarchy?"—was obviously answered truthfully by Petitioner—even if it be assumed that he was a Communist. Hence, there was no misrepresentation or concealment as to this first inquiry of Question No. 28.

We come then to the second inquiry of Question No. 28: "Do you belong to or are you associated with any organization which teaches or advocates anarchy *or the overthrow of existing government in this country?*" (Emphasis ours.)

In attempting to ascertain the meaning of this inquiry, we must be mindful that a finding of fraud like all other findings in a denaturalization proceeding, must be based upon "clear, unequivocal and convincing evidence"; and "that the facts and the law should be construed as far as is reasonably possible in favor of the citizen" (*Schneiderman* at p. 160).

This second inquiry, unlike the first, refers to membership and not to one's personal political beliefs. Thus, it refers to membership in either of two (2) *different* kinds of political organizations: the first relates to membership in an anarchist organization; the second, membership in an organization "advocating overthrow of existing government in this country."[8]

As to the first, Petitioner's negative answer was clearly a truthful answer—even if, as we have assumed, he was a Communist Party member. For, as we have seen and as the Trial Court held, the Communist Party was not an organization teaching anarchy.

Now, what of the second aspect of this inquiry—do you belong to an organization teaching "overthrow of the existing Government in this country?"[9]

Would a reasonable man in 1938—and assuming he was a Communist Party member—equate membership in the Communist Party with membership in an organiztaion "teaching overthrow of existing Government in this country"?

The short answer, of course, is that a majority of the members of this Court, after examining the same documents and the same character of oral testimony relied upon by the Government here, held that such an equation was not established. *Schneiderman v. United States, supra.*

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[8] This conclusion follows unless we accept the view that "overthrow of existing government in this country" and "anarchy" are used interchangeably in Question No. 28; and that the former was meant to be only a freehanded translation of the statutory proscription of the latter. But if this is so, then, clearly, Petitioner's negative answer was a truthful answer.

[9] We discuss later (*infra*, pp. 46-49) the constitutional implications of such an inquiry. Suffice it now to point out that the 1906 Act did not in terms authorize such an inquiry (*supra*, pp. 3-4).

There are, however, additional reasons for a negative answer here.

It must have been common knowledge to every Communist Party member in 1938, that a member of the national committee of their Party (Schneiderman) had been admitted to citizenship—and this under the same 1906 Act and same questionnaire as that involved here; and, further, that his qualification for citizenship had not been challenged.[19] A Communist Party member in 1938 must also have known that, notwithstanding repeated efforts, Congress had consistently refused to make advocacy of even *violent* overthrow, a proscription against naturalization.

A 1938 Communist in Detroit must have known, too, that the current of publicity in his community had for years associated "sit-down" strikes with Communists. From this he might well have concluded that, if Question No. 28 on his Petition for Citizenship was, indeed, meant as an inquiry concerning Communist Party membership, it would be more specific or, in any event, he would be specifically asked about such membership at the oral examination. The record here is that he was not and the Trial Court so held.

Nor was Petitioner, as an assumed 1938 Communist, obligated, against his own personal judgment, to so characterize the organization. He was entitled to make his own independent evaluation of the organization's teachings and advocacy as he reasonably understood them—not as the government's witnesses would characterize them sixteen years later. Hindsight is always clearer than foresight. It is one thing to determine now, and against the background of a current reappraisal of past events, that the

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[19] The Complaint in *Schneiderman* was filed June 30, 1939 (119 F. (2d) 500, 501).

Communist Party advocates overthrow of our Government. But it is still another thing to hold that an alien, in the pre-1938 period and without knowledge of these subsequent events, should have made the same appraisal. And this is particularly true where, as here, we are dealing with a period in which the Communist Party was an accepted political party in both State and National elections.[11]

Thus, the situation confronting Petitioner in 1938, as a reasonable man, with respect to this last portion of Question 28, is analogous to that dealt with by the Court of Appeals for the Third Circuit in *United States v. Kessler*, 213 F. (2d) 53 (1954). The Government there charged that the defendant's citizenship should be cancelled because she answered "No" to the question "Have you ever been arrested or charged with the violation of any law of the United States or of any city ordinance or traffic regulation".

The Government's proofs showed that defendant had been arrested for "obstructing highway" and discharged seventeen times. Defendant's contention was that each of these "arrests" was illegal since there was no such offense. The appellate court held that the defendant's "asserted interpretation of the scope of the question was a reasonable one for she had been informed by [the magistrate] seventeen times, and by counsel for her union on numerous occasions, that she had committed no crime cognizable at law."[12]

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[11] We have included here, as an appendix to this Petition a summary of the *New York Times Index* showing news items concerning the Communist Party in the pre-1938 period.

[12] It is pertinent here to observe that a Government inquiry such as Question No. 28, is so vague, indefinite and unclear in its meaning, that it may not serve to predicate a claim of illegal conduct. See the recent opinion of the Court of Appeals for the District of Columbia in *O'Connor v. United States*, unreported, 25 Law Week 2273, Dec. 20, 1956.

(3) The Showing as to Petitioner's Knowledge of the Advocacy of the Communist Party.

In determining whether the Petitioner wilfully misrepresented the fact of his alleged Communist Party membership, the question of his own knowledge and understanding of the teaching and advocacy of the Party, as disclosed by the evidence, must be considered. Cf. *Weiman v. Updegraff*, 344 U. S. 183. The determining factor is not the interpretation which the Government's witnesses placed upon the Party's program, nor the books attributed to the Party; but, rather, what the evidence shows concerning the Petitioner's knowledge and beliefs with respect to the organiization's teaching and advocacy.

The witnesses may have viewed the organization in one light, depending upon their organizational activity; Petitioner, as something altogether different. What an organization stands for, what it advocates and teaches is normally to be gathered from its constitution, resolutions and the official statements of its officers. These, as *Schneiderman* indicates, may be altogether different from the understanding of one of its members or the characterization ascribed to them by disgruntled former members some sixteen years later.

The testimony of the witness Zygmont, though ignored by the Trial Court as evidence in support of the Government's contentions, nevertheless, graphically illustrates the point we make here and supports our contention.

In 1937, Zygmont left the Communist Party and joined a "Trotskyite" organization (which was an opposition organization to the Communist Party) (Trial Tr. 883), because he believed the Communist Party to be a "phony revolutionary" party (Trial Tr. 885). In 1938, he wrote a pamphlet in which he condemned the program, aims and

objectives of the Communist Party and urged the members of that organization to join the "Trotskyite" party.

The following is the witness' own language with respect to the reasons for the writing of this pamphlet:

> "Q. (By Mr. Goodman, continuing): I will show you Defendant's Exhibit 6 and ask you whether you can identify that as a pamphlet that you wrote?
>
> A. Yeah.
>
> Q. And when did you write that pamphlet?
>
> A. 1938.
>
> Q. Was that written just after you had left the Communist Party?
>
> A. Yes.
>
> Q. And in that pamphlet, did you attempt to explain the reasons why you were breaking with the Communist Party?
>
> A. Yes" (Trial Tr. 891).

The following quotes from the pamphlet show Zygmont's understanding, *at that time*, of the aims and objectives of the Communist Party during the period up to 1938:

> "Stalinists desire to create People's Fronts on the model of the Mayflower, which in the year 1776 had for its purpose to struggle against England and to create capitalism in America."
>
> "This move at that time was progressive, but today, American capitalism is reactionary and imperialistic. However, the Communist Party desires to maintain it and stabilize it" (Trial Tr. 898).
>
> * * * * *
>
> "Communists have proven by deeds that they are struggling to maintain capitalism" (Trial Tr. 912).

Finally, at the end of his pamphlet, the witness told the readers of the virtues of the "Trotskyite" party as con-

stituting a truly revolutionary party (as distinguished from the Communist Party) which he urged the readers to join:

> "In order to abolish capitalism and introduce the Socialist order of society, the working class must aim to take over into its own hands the State power. Securing the State power by the Proletariat cannot follow the path of taking over the bourgeoisie State machinery through the medium of attaining a majority of the Parliament. The bourgeoisie will always utilize all manner of force and terror to defend and protect its property and its political supremacy. The Capitalists, like the feudal nobility, will not surrender to the new, rising class without bitter struggle.
>
> "Therefore, the force of the bourgeoisie can only be broken by the working class by immediate removal of the existing State apparatus. That is, the Capitalist Army, Police, Bureaucratic Hierarchy, Parliament and replace such by the organization of the Proletariat State" (Trial Tr. 935).

This single conflict in the opinion evidence with respect to this crucial issue in the Government's case should suffice to show that the proof here does not begin to meet the requirements of the *Schneiderman* decision of "clear, unequivocal and convincing evidence". If a man like Zygmont, who was so active and had been an official and an organizer for the Communist Party up to 1937, could then conclude that the Communist Party advocated cooperation with capital to effect a peaceful transition to socialism, as opposed to violent overthrow of the government, how can a finding of denaturalization in this case based on a contrary conclusion be said to be predicated on clear, convincing and unequivocal evidence?

However, it is not necessary that we argue nor is there any necessity for a determination here of what the teaching and advocacy of the Party actually was in 1938. What is important is Petitioner's knowledge and understanding of the program and advocacy of the Party.

The witness Eager, after considerable prodding, was able to recall that at one of the "thirty" closed Party meetings (Trial Tr. 311) he allegedly attended with Petitioner prior to 1938, he heard Petitioner say:

> "* * * And he said we couldn't depend entirely on ballots in this country; it was only by a militant Communist leadership in the shops, stores and factories and mines that we could expect to have a Soviet America" (Trial Tr. 315-316).

Later this same witness confessed (Trial Tr. 323):

> "A. I have heard him speak at several meettings. You can't keep it all in your mind. It is so long ago, I can't remember him passing any particular remarks that would leave any indelible mark on my memory."

But after more prompting by the Government, the witness recalled hearing Petitioner say prior to 1938 (Trial Tr. 324):

> "* * * that it was only by an aggressive Communist Party leadership in the unions that we could get the mass of the workers in back of that leadership, and whenever the revolution would come for a Soviet America that then we would have the people, the workers, at our back.
>
> Q. Did he ever discuss with you the role the unions would play in this revolution? (Tr. 324).
>
> * * * * *
>
> A. I can't say if I did" (Tr. 326).

And after still more prodding by Government counsel, this witness stated (Tr. 331):

> "A. I can't recall his exact words or expressions by anybody at meetings, it is so long ago, that is, the exact words of what was said. But it was on about the same order as what he said—he stated at Magnolia Hall, which was only by a militant leadership of the Party members in the stores, factories, and shops that we could ever hope to have a Soviet America. I think that was the general substance of his remarks.
>
> Q. (By Mr. Hamborsky): And that is all that you can recall he said during the time that you were a member of the Ternstedt Unit with Mr. Nowak?
>
> A. Well, that is about all I can actually recall that I can testify in court."

Notwithstanding the witness Eager had testified ten years previously before a grand jury and a legislative committee about Petitioner, this was the first and only time he had ever given the above testimony about alleged utterances of the Petitioner (Trial Tr. 371).

On re-direct Examination this witness was asked if he could recall "anything further" Petitioner had said at any meeting (Trial Tr. 378). He finally accommodated Government Counsel as follows (Trial Tr. 379):

> "A. The only thing I can recall him saying one night, at a meeting, that was slightly differen , I guess, and yet the same question of militancy and all that, and there was political action, the question was brought up at the meeting and he told us at that time that we couldn't depend too much on the ballot to gain our objectives *but that it would eventually resolve to bullets*, and it was only by the same militancy of the workers in the plants that we, as leaders, would be able to establish a Soviet America." (Emphasis ours.)

This belated reference to "bullets" should be compared with the above-quoted testimony (*supra*, p. 37) of Eager on direct examination regarding this same alleged speech.

The witness Nowell, employed by the Service as a "consultant" and used by the Government as a professional witness, was able to recall a meeting "around September of 1935" at which the Petitioner is alleged to have "recapitulated his—what he terms or stated was his ideology and political growth and maturity" (Trial Tr. 456-7):

> "He went on to make a brief analysis of capitalism and the conditions under which the Communist Party operated, that is, the theories under which it operated, and stated his full agreement with those theories and the leadership of the Communist Party of the United States and the Communist International, its program and final objectives—and I quote as nearly as possible—he stated that the working class could never achieve its objectives or get its rights under capitalism, that it would be necessary to destroy—I am reasonably sure of the word 'destroy'—capitalism and set up a government of the workers."

And, notwithstanding according to Nowell's own testimony, (*supra*, pp. 12-13) this was the meeting at which Petitioner was "inducted" into the Party!

The witness Fountain testified that Petitioner attended a Communist Party convention in "either 1937 or 1938" (Tr. 660). After considerable leading by Government counsel, this witness, too, was able to recall the following statement allegedly made by Petitioner at this Convention (Trial Tr. 664-5):

> "A. Well, just to go into more detail on what was said in that class in which Mr. Nowak was one of the lecturers, the goal of all this activity was to

extend the Soviet system around the face of the earth, and it was said that the primary work was to get to them through working people, through labor. Through working class organizations and Unions, and that the duty of the Communist Party was to get its members inside these unions wherever that was possible, and to attempt to control them and to direct them, and to win their loyalty over to the Russian system."

* * * * *

"A. The only way that I can answer it is to say that in substance, in the course of this lecture, he said that when you are a Communist, you try to win control of your union for the Communist Party; you agitate an election; you work by trying to win elections and get people elected to office, Communists and otherwise, and that this is to be carried on year in and year out, seeking control for the Communist Party.

You can't get it that way then it may be necessary to use violence to get it, to win control, or the Communist Party and the Communist system. That was his goal." (Emphasis supplied.)

The foregoing testimony represents the evidence offered by the Government to support its claim as to Petitioner's knowledge of the nature and advocacy of the Communist Party. It is upon this evidence that Petitioner's citizenship is cancelled. Where is there here any advocacy by Petitioner of overthrow of the Government of the United States? Or any evidence that he knew the Communist Party as such? The most that can be said is that these utterances indicate opposition to the capitalist system (which is not the Government of the United States), and a desire to see that system eventually replaced by the institution of a workers' government such as was believed to exist under the "Soviet" system. (Cf. *United States v.*

Rovin, (E. D. Mich.) 12 F. (2d) 942, quoted with approval in *Schneiderman*, p. 138.)

Moreover, even if the term "Soviet system" is assumed to refer to the system of government rather than the economic system in the Soviet Union, is it not permissible under the amendment provisions of our Federal Constitution to substitute that system of government for our present system of government? And, if this be true, is it not also permissible under the First Amendment to advocate such substitution? Attachment to the principles of our Constitution—which the Court below says the above reference to "Soviet system" negates—does not necessitate a belief that the Constitution is static and cannot be changed at any time. And certainly attachment to the Constitution presupposes attachment to its First Amendment which, as we argue herein later (*infra*, p. 46-49) protects even advocacy of *violent* overthrow in the absence of a showing of "incitement" or a "clear and probable danger."

One final point remains to be considered on this issue of the Petitioner's knowledge and understanding of Communist Party advocacy in 1938. While the Trial Court recognized (App. 29a) that membership alone in an organization is insufficient to predicate a finding of knowledge of alleged illegal teaching and advocacy of that organization (*Schneiderman*, at p. 154-155), both the Trial Court and the Court of Appeals endeavor to overcome this by calling attention to findings concerning the Communist Party made upon *other* records and involving other times.[13] Thus, the Trial Court (App. 30a-31a) concludes (App. 32a):

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[13] The Court of Appeals refers only to post-1945 decisions.

> "Therefore, since at the time defendant petitioner for naturalization the Communist Party had been held to be and was an organization advocating the overthrow of this government by force and violence (citing decisions of lower courts) a fact well known to defendant, we conclude that defendant by answering question No. 28 in the negative intentionally concealed his membership in the Communist Party in the United States."

This inference by the Trial Court as to Petitioner's knowledge in 1938 of these prior lower court decisions, ignores the fact, made clear by this Court in *Schneiderman* (p. 147) that:

> "On varying records *in deportation* proceedings some courts have held that administrative findings that the Party did so advocate was not so wanting in evidential support as to amount to a denial of due process, others have held to the contrary on different records, * * *. This Court has never passed upon the question whether the Party does so advocate * * *."

It cannot be assumed, as the Trial Court and Court of Appeals did, that merely because, upon the trial records in the cases they cite, the courts there characterized the Communist Party in one manner, all other courts were bound to arrive at the same conclusion regardless of the trial record before them. Nor is there any foundation for the Trial Court's assumption that Petitioner was aware of these decisions by lower Federal Courts.

In affirming the Trial Court, the Court of Appeals appears to have placed prime reliance upon its prior holdings in the *Sweet, Chomiak* and *Charnowola* cases, 211 F. (2d) 118 (1954); cert. den. 348 U. S. 817. But naturalization in each of those cases occurred in the post-1945 period and was pursuant to the 1940 Nationality Act. That Act

(*supra*, pp. 4-5), unlike the 1906 Act, expressly forbade naturalization of anyone who, within the prior ten-year period, had been a member or affiliate of an organization teaching or advocating the *violent* overthrow of Government.

In the light of these considerations it cannot be said that the record here—even if all the Government's testimony is credited—establishes clearly, convincingly and unequivocally that Petitioner in 1938 knew or had reason to know the Communist Party as an organization which taught and advocated the "overthrow of existing government in this country."

And it follows from this that the third requirement for a finding of fraud is lacking here.[14]

III.

THE NATURALIZATION COURT'S FINDING OF GOOD MORAL CHARACTER AND ATTACHMENT CANNOT BE RE-EXAMINED IN THE ABSENCE OF FRAUD

The Trial Court's finding of illegal procurment is predicated upon its conclusion that Petitioner lacked attachment and good moral character at the time of his naturalization. And this conclusion is in turn based upon the finding of undisclosed Communist Party membership.

What we have said above in connection with the finding of fraud applies with equal vigor to the finding of illegal-

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[14] The Government also charged that Petitioner's negative answer to Question No. 23 ("Do you fully believe in the form of Government of the United States?") was false and that Petitioner's oath was false. But the Trial Court made no finding as to either of these. In any event, however, what we have said above applies with equal validity to these contentions.

ity. For it was the finding of fraud which served as the basis for the finding of lack of attachment and good moral character.

There is, however, an added reason why the finding of illegality cannot be supported upon this record.

Since the judgment of naturalization is itself a finding of attachment and good moral character based upon testimony of competent witnesses, any conclusion that Petitioner lacked good moral character and attachment in 1938 necessarily assumes that the Court below possessed the power at any time to re-examine the factual issues and findings made by the Naturalization Court. In this case re-examination occurs sixteen years after the time of Petitioner's naturalization. The question thus is presented whether or not the denaturalization statute by its terms or by necessary construction confers such judicial power.

The answer depends upon a proper interpretation of the 1906 Act's statutory requirements of "good moral character" and "attachment." Does the statute mean that each petitioner must possess these attributes as an objective fact on which all courts and all judges at all times must agree? Or does the statute mean that each petitioner, at the time of his naturalization, must show to the satisfaction of the Naturalization Court, and that court must *find as a fact*, that the petitioner possesses these attributes? We contend that the statute must necessarily mean the latter; otherwise the judicial findings underlying naturalization are never settled but vary according to the particular judge and the particular times in which their re-examination is sought.

The question of whether findings of attachment and good moral character could be set aside years later, while noted in the majority opinion in *Schneiderman, supra,* at

pp. 123-125, was not reached by the Court. The Court there held that, in any event, the evidence failed to establish the charge of lack of attachment or good moral character; and this, notwithstanding the Petitioner there admitted long-time membership and high officership in the Communist Party; was familiar with most of the documents offered by the Government; and had failed to disclose this information on his naturalization examination (*Schneiderman v. United States*, 320 U. S. at pp. 126-128; 119 F. (2d) 500, at p. 502.)

But this question was the subject of Mr. Justice Douglas' concurring opinion in *Schneiderman, supra*, p. 161. He was of the view that the statute made the naturalization court's finding (as to the petitioner's attachment and good moral character) the "condition precedent" to naturalization; and not the actual possession by petitioner of these subjective attributes. Therefore, he concluded (pp. 162-163):

> "It is my view that Congress by that provision made the finding the condition precedent, not the weight of evidence. Such a finding can of course be set aside * * * on grounds of fraud."[15]

The interpretation thus set forth by Justice Douglas has become the accepted view of this Court. In the later case, *Knauer v. United States*, 328 U. S. 654, where Mr. Justice Douglas spoke for this Court, the issue was fraud in the taking of the naturalization oath. The defendant

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[15] The change of wording contained in the denaturalization section of the 1952 Act appears to confirm this view. The elimination in this Act of the ground of illegal procurement is generally accepted as evidencing a Congressional intent that attachment and good moral character not be re-examined in the absence of "concealment of a material fact or wilful misrepresentation." See *66 Har. L. R. 643, 719* and *51 Mich. L. R. 881, 892.*

argued that the question of the validity of his oath was not open to re-examination. The rationale upon which this Court decided this issue adversely to the defendant, supports the above view expressed by Mr. Douglas in *Schneiderman*. For in *Knauer* this Court said (p. 670):

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, *the establishment of which Congress has made conditions precedent to naturalization*. Those facts relate to the past—to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated." (Emphasis supplied.)

We emphasize the words "the establishment of which" because of their particular significance; they indicate that in the opinion of this Court in *Knauer* it was the objective fact of attachment and good moral character, *established by judicial finding*, which constituted the condition precedent to naturalization; and not the subjective fact of whether or not the petitioner actually possessed attachment or good moral character.

Moreover, such an interpretation of the statute is required to avoid both abrogation of the judicial doctrine of *res adjudicata* in naturalization cases as well as the question of constitutional separation of powers referred to by Mr. Justice Rutledge in his concurrence in *Schneiderman*. For since, as we have demonstrated above, there was no fraud committed by Petitioner, it follows that the determination of attachment and good moral character, necessarily made by the Naturalization Court, is *res adjudicata* or protected by the principle of collateral estoppel (*Commissioner v. Sunnen*, 333 U. S. 591, 596-598; *So. Pac. Co. v. U. S.*, 168 U. S. 1, 48-49; *Sealfon v. United States*, 332 U. S. 575; *U. S. v. Oppenheimer*, 242 U. S. 85); unless a different rule is to be applied by this Court in denaturalization cases.

IV.

THE ORDER OF DENATURALIZATION VIOLATES THE FIRST AND FIFTH AMENDMENTS

As we have seen, the 1906 Act, as amended, was in force at the time of Petitioner's naturalization in 1938. The Trial Court held that the validity of Petitioner's naturalization had to be determined by that Act. But the 1906 Act speaks in terms of "anarchy" and nowhere is there any mention of advocacy of "the overthrow of existing government in this country." This Act also specified what should be contained in petitions for naturalization filed pursuant to its provisions; and did not include the question of "overthrow of existing government in this country." (See 34 Stat. 497.)

The introduction of this concept of "overthrow" is an innovation made by the Immigration Service. Its validity does not appear to have been passed on by this Court.

It is clear, however, that if Congress itself could not have made such a requirement a precondition for citizenship, then the Immigration Service, as an agency of Congress, lacked authority to do so.

We have seen that, although frequently requested to do so, Congress refused to enact such a proscription prior to the Nationality Act of 1940; and this, notwithstanding it had passed a similar provision with respect to persons seeking entry into this country. This failure to legislate is potent proof that Cngress did not intend such a proscription to be grafted upon the 1906 Act by administrative fiat.

But aside from the question of Congressional intention, there is the more fundamental question of Congressional power, under the limitations of the First Amendment and the Fifth Amendment,[16] to exclude from citizenship members of organizations which teach and advocate "overthrow of existing government in this country."

This Court held that a State may not proscribe advocacy of overthrow of government so long as such overthrow is to be by peaceful means. To do so is to violate the "due process clause of the Fourteenth Amendment." *Stromberg v. California*, 283 U. S. 359. If due process thus prohibits such prohibition by a State, the same due process under the Fifth Amendment prohibits such action by Congress.

Again, since we deal here in the realm of speech, beliefs and associations, this Court also has said that advocacy of overthrow—even violent overthrow—is protected by the First Amendment in the absence of a showing that such

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[16] It is settled that resident aliens are within the protection of these Amendments. *Bridges v. California*, 314 U. S. 190.

advocacy was by words of incitement to action (*Near v. Minnesota*, 283 U. S. 697, 716; *DeJonge v. Oregon*, 299 U. S. 355, 363-6; *Herndon v. Mallory*, 301 U. S. 242, 261), and *Dennis v. United States*, 341 U. S. 494.

And, finally, this Court has said that Congress lacks the power to circumscribe speech or other conduct within the purview of the First Amendment, unless it is shown that such speech or conduct offers a clear and present (or probable) danger of substantive evil. *Dennis v. United States*, 341 U. S. 494; *Terminello v. City of Chicago*, 337 U. S. 1, 4; *American Communications Assn. v. Douds*, 339 U. S. 382.

Surely, therefore, if Congress could not validly enact such a proscription without including either expressly or by necessary implication the above limitations, the Immigration Service lacked authority to do so under any power delegated to it by Congress.

The judgment below necessarily implies an interpretation of the Act of 1906 to include a proscription against advocacy, or against membership in an organization engaged in advocacy, of overthrow of the government. But any such interpretation, to be constitutionally valid, must also read into that Act (and into Question No. 28) the further limitations that such advocacy be advocacy of *violent* overthrow; that it be by language *inciting* to action; and that it be under circumstances presenting a clear and present danger of substantive evil. These are the minimal limitations which this Court found to be constitutionally requisite to sustain the constitutionality of the similar proscription in the Smith Act. *Dennis v. United States*,

supra.[17] See also *Bridges v. California*, 314 U. S. 252 and the concurring opinion by Mr. Justice Rutledge in *Musser v. Utah*, 333 U. S. at p. 98.

Thus, even if the 1906 Act be interpreted as authorizing Question No. 28, the judgment of cancellation here is unconstitutional since there is no evidence and no finding of "incitement to action" and the proofs fail to support a claim that any advocacy by this Petitioner or by the Communist Party in the pre-1938 period offered a "clear and present danger of a substantive evil."

CONCLUSION

The Writ of Certiorari should issue and the judgment below should be reversed.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN & ROBB,

By: ERNEST GOODMAN, GEO. W. CROCKETT, JR.,
Counsel for Petitioner.

Detroit, Michigan,
January —, 1957.

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[17] In *Dennis* the jury was instructed and found that the teaching and advocacy of the Communist Party in the indictment period (post-1945) was "by language reasonably and ordinarily calculated to incite persons to action" (9 F. D. R. 367, 391). This finding was deemed by this Court an "essential" element of the offense. 341 U. S. 494, 512. There is no comparable finding here with respect to the pre-1938 period.

APPENDIX

An examination of the *New York Times Index* for the period 1934 to 1938 reveals the following selected news items concerning the Communist Party:

1934

Apr. 3—Party Convention at Cleveland.
Apr. 29—Party's Election Slate in New York.

1935

Mar. 25—Debate between John Strachey and E. D. Martin on Communism as Solution to Depression.
Apr. —Party's election slate in New York.

1936

Mar. 5-
10—Nationwide Broadcast over Columbia Broadcasting System by Earl Browder for Communist Party; criticism of Columbia Broadcasting System for allowing the same and reply of broadcasting system; comments by Congressmen.
June 15—Party's Convention and Proposed Candidates for Federal offices.
Dec. 21—Party's Presidential Campaign Expenses in California.

1937

Aug. 25—Party to publish daily newspapers in Chicago and San Francisco.

Sept. 14—Celebration of 18th Anniversary of the Party.
Oct. 18—Browder pledges Party support to Roosevelt.
Nov. 14—Party's celebration of 20th Anniversary of USSR.
Dec. 10—Party wins legal action to obtain use of Philadelphia Municipal Convention Hall.

1938

Jan. 20—Party mass meeting in Madison Square Garden, New York City.
Feb. 5—Party's membership announced at 60,000.
Feb. 19—Twenty-two thousand new members reported by Party.
Feb. 22—*Earl Browder, Party's National Secretary, denies that Party seeks violent overthrow of United States Government;* publication of Party resolutions.
May 15—Draft of Party's National Constitution.
May 22-24—New York State Party Convention; report on finances and enrollment; officers elected; approval of Party's National Constitution requiring members to be citizens and to pledge themselves to peace and democracy.
May 27-31—Party's National Convention.
June 1-21—Party's New National Constitution and election platform.
June 30—Browder testifies on tenets of Party.
Sept. 5—Browder asks support for Roosevelt.
Nov. 6—Communist Party has 15 Candidates for House of Representatives.

The following public information concerning the Communist Party in Michigan for the years 1932-38 is taken from the *Michigan Official Directory and Legislative Manual* for 1941-2, issued by the Michigan Secretary of State:

1932—William Z. Foster, Communist Party Candidate for President of the United States received 9,318 votes in Michigan (p 460).

1936—Earl Browder, Communist Party candidate for President received 3,384 votes in Michigan (p. 461).

(The *Manual* lists the Communist Party's candidates and the vote received by each for all major National and State offices in Michigan.)

Nos. 12765; 12768

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Stanislaw Nowak, *Appellant*, v. United States of America, *Appellee*.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.
Rebecca Maisenberg, *Appellant*, v. United States of America, *Appellee*.	

Decided November 26, 1956.

OPINION

Before Simons, Chief Judge; Martin and Miller, Circuit Judges.

Per Curiam. These two denaturalization proceedings were tried separately in the district court and heard separately on appeal from orders entered by United States District Judge Picard of the Eastern District of Michigan, revoking orders granting citizenship to appellants and canceling certificates of naturalization issued to them respectively on June 13, 1938, and on January 24, 1938.

Upon consideration of the briefs, the oral arguments and the records in these two cases, we find that all the points

of law made and argued by appellants—except the question of whether the affidavit of good cause in each of the cases was sufficient to confer jurisdiction upon the district court—have been adjudicated adversely to the contentions of appellants in the opinion of this court, affirming judgments of denaturalization entered, respectively, by United States District Judges Levin, Thornton, and Picard, of the Eastern District of Michigan, in *Sweet v. United States, Chomiak v. United States,* and *Charnowola v. United States,* 211 F. (2d) 118 (C. A. 6), decided February 19, 1954. Our opinion in those cases cited relevant Supreme Court opinions: *Knauer v. United States,* 328 U. S. 654; *United States v. Ginsberg,* 243 U. S. 472, 475; *Schneiderman v. United States,* 320 U. S. 118; *Dennis v. United States,* 341 U. S. 494, 498; *Blau v. United States,* 340 U. S. 159, 161; and also the opinion of Chief Judge Simons of this court in *Albertson v. Millard* [E. D. Mich., 1952], 106 F. Supp. 635, 642, 643, 644.

The findings of fact of the district judge in each of the cases now under review were supported by substantial evidence and certainly were not clearly erroneous; and the conclusions of law in both cases were based upon logically correct reasoning and supported by highest authority.

Appellants argue that the required affidavits of good cause were insufficient to confer jurisdiction upon the district court. When boiled down, the argument is that the affidavit of good cause filed in each of these cases was based on hearsay and was not evidentiary in character. It is contended that the opinion of the Supreme Court in *United States v. Zucca,* 351 U. S. 91, holds that an affidavit showing good cause is a procedural prerequisite to maintenance of denaturalization proceedings, that the government attorney must file an affidavit showing good cause, and that

"the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship."

In our judgment, the affidavit of an attorney of the Immigration and Naturalization Service of the United States Department of Justice reciting facts appearing in the official records, such as the affidavit filed in each of these cases, was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case. The affidavit thus set forth sufficient evidentiary matters to show good cause for cancellation of the citizenship of each appellant. Fairly construed, the affidavit states facts appearing in the official records of the Immigration and Naturalization Service. It would be too stringent a requirement to hold that the good cause affidavit need embrace testimony of prospective witnesses. The affidavits in issue gave fair and sufficient notice of the facts charged as a basis for cancellation of citizenship of the appellants as to apprise them properly of the facts and reasons upon which their citizenship was sought to be revoked. Appellants were thus sufficiently apprised of the charges as to be prepared to meet the proof thereof, if they had been able to do so.

Upon the entire record, we are of opinion that the United States proved the allegations upon which the certificates of naturalization were canceled, by clear, unequivocal and convincing evidence.

The order or judgment of the district court in each case is affirmed.

Judge Miller concurs in the result.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 72

STANLEY NOWAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

ERNEST GOODMAN
GEORGE W. CROCKETT, JR.
Attorneys for Petitioner
3220 Cadillac Tower
Detroit 26, Michigan

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Public Act No. 138, 76 Cong., Chap. 224, 1st Sess.	28
H.R. 1352, 1st Sess. 72 Cong.	34
H.R. 12044, Sec. 2; 1st Sess. 72 Cong.	33
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 72

STANLEY NOWAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (App. p. 145) is reported at 238 F. (2d) 282. The opinion of the District Court (App. p. 135) is reported at 133 F.Supp. 192.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sec. 1254. The Petition for Writ of Certiorari was granted on April 1, 1957.

Questions Presented

1. Does the "Affidavit of Good Cause" filed with the Complaint satisfy the requirements set forth in *U. S.* v. *Zucca*?

2. Is the naturalization court's finding of good moral character and attachment to the Constitution, subject to the principles of *res adjudicata*, so as to preclude re-examination in the absence of fraud?

3. Did the failure to voluntarily disclose Communist Party membership in naturalization proceedings in 1938 constitute concealment amounting to fraud?

4. Is the evidence sufficient to establish the charge that Petitioner's naturalization was illegally or fraudulently procured?

5. Was Petitioner deprived of his citizenship in violation of rights guaranteed under the First and Fifth Amendments?

Statutes and Regulation Involved

The pertinent statutes and regulation provide as follows:

The Nationality Act of 1906, as amended;

Section 4, paragraph 4 (34 Stat. 596, as amended) 8 U.S.C. (1934 ed.) 382:

> No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the period referred to in this subdivision he has

behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. * * *

Section 7 (34 Stat. 598, 8 U.S.C. (1934 ed.) 364):

No person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

Section 15 (34 Stat. 601, as amended 8 U.S.C. (1934 ed.) 405) (replaced in 1940 by Section 338 (a) of the Nationality Act of 1940):

It shall be the duty of the United States district attorneys for the respective districts, or the Commissioner of Immigration and Naturalization or Deputy Commissioner of Immigration and Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * *

* * * * *

Section 338 (a) of the Nationality Act of 1940 (54 Stat. 1158, 8 U.S.C. (1940 ed.) 738 (a)):

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

* * * * * *

Section 8 of the Act of March 2, 1929 (45 Stat. 1512), amending the Nationality Act of 1906, in part:

> The Commissioner of Naturalization, with the approval of the Secretary of Labor, shall make such rules and regulations and such changes in the forms prescribed by section 27 of this Act as may be necessary to carry into effect the provisions of the naturalization laws.

Code of Federal Regulations (1938 ed.), Title 8, Section 70.7:

> Wherever practicable, preliminary examinations of applicants for naturalization and their witnesses will be made in person. The principal purpose of such examinations is to obtain information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdic-

tional requirements of law, is mentally and morally qualified for citizenship, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States * * *.

Subsequent to Petitioner's naturalization, the foregoing Sections of the 1906 Act, as amended, were repealed by the Nationality Act of 1940 (8 U.S.C. 907, etc. 54 Stat. 1137). The 1940 Act changed the above-quoted language of the behavior requirement of Section 4 of the 1906 Act so as to require a showing that the applicant "has been and still is a person of good moral character, attached to the principles of the Constitution of the United States * * *" (54 Stat. 1142; 8 U.S.C. 707). It also expanded the belief requirements of the former law so as to preclude naturalization of any person:

(a) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government; or

(b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society or group that believes in, advises, advocates or teaches—

(1) the overthrow by force or violence of the government of the United States or of all forms of law;"

In addition, the 1940 Act also reenacted substantially the above-quoted Section 15 of the 1906 Act, as amended, authorizing cancellation of any naturalization certificate upon the grounds of fraud or illegal procurement. (54 Stat. 1158, 8 U.S.C. 738 (a).) Subsection (g) of this section made this cancellation provision applicable "to any naturalization heretofore granted by any Court."

Statement of the Case

This is a proceeding to cancel Petitioner's citizenship granted to him in 1938 in accordance with the Nationality Act of 1906, then in effect (*supra*, p. 2). It is brought pursuant to the denaturalization provision, Section 15, of the 1940 Act. The Complaint was filed on December 23, 1952, two days before the Immigration and Nationality Act of 1952 became effective. The pertinent distinction between the denaturalization provisions of the 1940 and the 1952 Acts is that the former authorizes cancellation of citizenship "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured;" whereas, the latter authorizes cancellation on the ground of "concealment of a material fact or by wilful misrepresentation."[1]

Petitioner was born in Przemysl, Poland in 1903. At the age of 10, in 1913, he emigrated with his sister to the United States to live with their father in Chicago. There he attended grammar and high school.

As a young man of 21 he came to Detroit to edit a weekly labor newspaper in the Polish language. Within two years he returned to Chicago where he was caught up in the depression and became one of the unemployed of 1932.

The following year, 1933, he came back to Detroit, where his unemployment continued until he obtained a job in the automobile industry. During the next several years he worked for two employers and was self-employed for a time.

When the labor organizing drive among the automobile workers of Detroit began in 1936, Petitioner became a union organizer for the United Automobile Workers of America,

[1] The significance of this difference in the statutory language of the 1940 Act and the 1952 Act is considered in Petitioner's Brief in the companion case, *Maisenberg* v. *U. S.*, filed in this Court.

a position which he retained until his citizenship was granted several years later. In this capacity he performed the usual duties of a union representative; he met with various groups of employees, explaining the union movement and soliciting their union membership; he organized workers into local unions at their plants, and he met and advised with them in connection with their employment grievances; he attended union conferences and conventions, made many speeches, and was otherwise active in union affairs.

As union organizer attached to the UAW-CIO West Side (Detroit) Local 176, he helped organize the employees at the Ternstedt Manufacturing Company and other Detroit plants. In December 1936, he participated actively in assisting the sit-down strikers at the American Aluminum Company; later, in his naturalization proceeding, he took the position that in some cases sit-down strikes are necessary to enforce the workers' demands.

He was married in May, 1935, to a native American and has lived with his wife and daughter in Detroit since.

In June, 1937, Petitioner filed his Preliminary Form for Petition for Naturalization, and on June 13, 1938, he became a naturalized American citizen by order of the United States District Court at Detroit.

In September, 1938, three months after Petitioner became a citizen, he announced his candidacy for the Michigan State Senate from 21st Senatorial District which included the west side of Detroit and outlying communities. He was nominated in the Democratic primary over his six opponents and, in November, was elected with a vote of 47,815 to 38,378 over his Republican rival.[2]

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[2] "App." refers to the Appendix to this Brief. In Appendix "A," p. 107, we include the results of this and subsequent elections at which Petitioner was elected to the State Senate, a list of bills and

Thereafter, for five successive two year terms, he was renominated in the Democratic primary and elected in the subsequent election. In 1946 no opponent appeared against him in the final election.

During his term of office as State Senator, Petitioner served on nine different committees, including Education, Taxation, Insurance and Labor. He introduced fifty-four bills. These dealt with such diverse subjects as child labor, old age assistance, negligence law, insurance, taxation, prison reform, unemployment and workmen's compensation, and welfare.

He also introduced twenty-three resolutions concerning such matters as the investigation of job selling, the investigation of relief fund administrations, migratory workers' camps, wage increases for civil service employees and reducing the voting age to 18 years.

On December 11, 1942, following his second re-election to the Michigan Senate but before his scheduled induction into office, the Federal Grand Jury at Detroit returned an indictment against Petitioner for false swearing and giving false testimony in his naturalization proceeding. The indictment charged that he had been affiliated with the Communist Party and, at the time of his naturalization, had falsely denied the same.* Subsequent to his induction as State Senator, on February 8, 1943, on written motion of the Special Assistant to the Attorney General, Henry A. Schweinhaut, the District Court entered an order of Nolle Prosequi, dismissing the indictment.

Resolutions introduced by Petitioner in the Michigan Senate during his 10 year term, and a list of the Committees on which he served, as compiled from the official Michigan Manual and the Michigan Senate Journal.

* We attach a copy of the indictment as Appendix B, p. 113. The charge is predicated upon virtually the same factual allegations made in the instant Complaint.

THE PLEADINGS[4]

The Complaint, as amended (App. pp. 116-125) alleges that the Petitioner made four false representations in the course of his naturalization proceeding:

First: That in the oral examination on his Petition for Naturalization, Petitioner was asked and falsely denied membership in the Communist Party.

Second: That Petitioner answered falsely to the following questions in his Preliminary Form of Petition (App. p. 129):

"(23) Do you fully believe in the form of Government of the United States? Yes."

"(28) Are you a believer in anarchy? No. Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? No."

Third: That the following statement in his Petition for Naturalization was false (App. p. 131):

"(7) I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a

[4] We have included, as Appendix C, p. 116, the basic pleadings, the Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization, and the Opinions of the Courts below. These we deem essential to a consideration of the issues discussed in this Brief.

> citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty * * *."

Fourth: That the following oath taken by Petitioner in open Court was false:

> "That he would support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion."

The Complaint further charged that Petitioner lacked the requisite "good moral character" and was not attached to the principles of the Constitution at the time of his naturalization. Cancellation of his naturalization was requested upon both of the statutory grounds set forth in the 1940 Act—fraud and illegal procurement.

Attached to and made a part of the Complaint is the affidavit of one Reuben Speiser, an attorney for the Immigration and Naturalization Service, United States Department of Justice, executed on December 3, 1952. The affidavit states that affiant "has access to the official records of the said Service from which the following facts appear." The affidavit then sets forth the date and place of Petitioner's naturalization, the answers given by Petitioner in the course of his naturalization, and charges that such answers were false (App. p. 121).

The affidavit further charges that Petitioner was "an active member of the Communist Party of the United States from about 1935 until the date of his naturalization and has continued such membership until the present time." The affiant then avers that Petitioner and the Communist

Party, "at all times mentioned herein," engaged in conduct allegedly proscribed by the 1940 Act; "that the Communist Party of the United States was a section of an international organization whose principal officers were citizens" of the Soviet Union and "that decisions made by such organization were binding upon * * * the Communist Party of the United States and the members thereof;" that Petitioner "at all times since 1935" bore allegiance to the Soviet Union, and that he "intentionally and deliberately made false statements" in his naturalization proceeding "in order to prevent * * * proper investigation of his qualifications for citizenship;" and "to conceal his lack of attachment * * * and to procure naturalization in violation of law."

The affidavit then sets forth the affiant's conclusion that Petitioner's naturalization "was illegally and fraudulently procured;" that Petitioner lacked good moral character and attachment by reason of his alleged Communist Party membership and the allegedly false answers given in his naturalization papers; and "that good cause exists for the institution" of a denaturalization proceeding against Petitioner.

Petitioner's Answer admitted the execution and filing of the above-mentioned naturalization forms, the taking of the oath, and the grant of naturalization. It denied that the answers given or the oath taken were false; and it denied the allegation of Communist Party membership (App. p. 126).

The Answer also challenged the sufficiency of the Speiser affidavit, alleging that the same is "based upon hearsay," sets forth "conclusions" and "is not in the form required by law."

Additionally, the Answer alleged the following as special defenses and moved for dismissal of the Complaint:

(a) That the institution of this proceeding ten years after the dismissal of an indictment based upon identical charges

constitutes an abuse of the process of the Court and a denial of due process.

(b) That Section 338(a) (8 U.S.C. Sec. 738(a)) of the Nationality Act of 1940 (under which the suit is brought) on its face, and as applied to Petitioner, is unconstitutional under the First and Fifth Amendments to the Federal Constitution.

(c) That the judgment of naturalization is *res judicata* as to all issues determined thereby.

THE EVIDENCE.

The Government called twelve (12) witnesses. Two of these were naturalization examiners who testified as to Petitioners' alleged oral representation to them that he was not a member of the Communist Party. Nine (9) witnesses gave testimony addressed to the issue of Petitioner's alleged membership in the Communist Party. Two witnesses, Baxter and Nowell, testified as "experts" in regard to the "aims and objectives" of the Communist Party.

The Government introduced fourteen (14) Marxist-Leninist books and pamphlets, identified as literature used and distributed by the Communist Party during the period of Petitioner's alleged membership.[5]

Petitioner was not called to the stand by the Government and offered no testimony at the trial.

THE OPINIONS BELOW[6]

The Trial Court held that the validity of Petitioner's naturalization must be determined by the Nationality Act

[5] These books and pamphlets are identified and listed in Appendix "D," p. 147.

[6] The Opinions below are set forth in Appendix "C," pp. 135, 145.

of 1906, as amended, in effect at the time of Petitioner's naturalization; that the "belief" proscriptions in that Act were directed "at polygamists and anarchists" and that nothing contained in Section 7 of that Act "barred naturalization of one because he was a member of the Communist Party" (App. p. 136). However, the Trial Court concluded that Petitioner was a member of the Communist Party at the time of his naturalization and knew that the organization advocated "the overthrow of this Government by force and violence"; that he intentionally concealed his Communist Party membership when he answered Question No. 28 on his Preliminary Form and also at the time he swore allegiance; and that this concealment, together with the nature of the organization, marked Petitioner as a person lacking in good moral character and attachment to the Constitution.

The order of cancellation, based upon a finding of fraud and illegal procurement, was entered on August 9, 1955.

The Court of Appeals, affirming the Trial Court, held that all of the legal issues presented (except as to the sufficiency of the affidavit of good cause) "have been adjudicated adversely" to Petitioner—by the prior opinions of the Court of Appeals wherein that Court had cited the Supreme Court's holding in *Knauer* v. *United States*, 328 U.S. 654; *United States* v. *Ginsberg*, 243 U.S. 472; *Schneiderman* v. *United States*, 320 U.S. 118; and *Dennis* v. *United States*, 341 U.S. 494. It concluded that the District Court's findings "were not clearly erroneous" and that its conclusions of law were "supported by the highest authority."

The Court of Appeals also held that the affidavit of good cause here "was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case." (*U. S.* v. *Zucca*, 351 U.S. 91.)

Summary of Argument

I. The affidavit of good cause filed with the Complaint was not based upon the personal knowledge of the affiant, did not set forth evidentiary facts, and was, therefore, insufficient to confer jurisdiction upon the Trial Court under the decision of this Court in *United States* v. *Zucca*, 351 U.S. 91.

II. The conclusion that Petitioner's citizenship was obtained fraudulently or illegally was erroneous as a matter of law.

A. There was no fraud because the naturalization law, in 1938, did not proscribe Communist Party membership; such membership was not material to naturalization; and on this record it cannot be found that inquiry was made of Petitioner concerning his alleged Communist Party membership.

B. A charge of illegal procurement cannot be based upon alleged lack of good moral character or attachment to the Constitution; the judgment of naturalization is *res adjudicata* as to these issues.

III. A review of the evidence, and an application thereto of the *Schneiderman* (320 U.S. 118) standard of "clear, convincing and unequivocal," demonstrates that the Government here has failed to establish its charge that Petitioner was a member of the Communist Party in the pre-1938 period; that the organization, during that period, was engaged in prohibited advocacy; and that Petitioner had knowledge of such advocacy.

IV. Petitioner's citizenship was revoked in violation of rights guaranteed by the First and Fifth Amendments, because

A. Adequate cross-examination of key government witnesses was foreclosed by the Trial Court's denial of the right to examine prior written statements of such witnesses, contrary to the principles of *Jencks* v. *United States*, 77 S.Ct. 1007.

B. There was a fatal variance between the Complaint and the findings in that the former charged that the Communist Party "advocated" violent overthrow of the government while the latter found only that the "aim and objective" of the Communiet Party was such overthrow, without any finding of advocacy.

C. There was no evidence of advocacy of action as distinguished from advocacy of theory; there was also an absence of any evidence showing a clear and present danger with respect to any advocacy.

ARGUMENT

I.

The Affidavit of Good Cause Filed With the Complaint Herein Does Not Satisfy the Requirements Set Forth in United States v. Zucca.

Ever since the opinion of this Court in the *Zucca* case, 351 U.S. 91, 76 S.Ct. 671, the lower Federal Courts have struggled with the questions of what constitutes a sufficient affidavit of good cause in denaturalization proceedings within the meaning of *Zucca* and whether the affidavit is "jurisdictional" in the sense that, without a sufficient affidavit filed at the commencement of the action, the District Court lacks jurisdiction to entertain the proceeding. See *United States* v. *Kaplan*, 150 F.Supp. 577, D.C. Conn., May 4, 1956; *United States* v. *Costello*, unreported, S.D.N.Y. No. 70-309. May 21, 1956; *United States* v. *Chandler*, 152 F.Supp. 169, D.C. Md., June 27, 1956; *United States* v. *Mae Sweet*, unreported, E.D. Mich. No. 13349; *United States* v. *Kail*, unreported, N.D. Ohio, Civ. No. 30355; *United States* v. *Todorovich*, unreported, N.D. Ohio, Civ. No. 31185; *United States* v. *Diamond*, unreported, S.D. Cal. Nos. 17412-B-H and 17413-B-H.

Since the granting of certiorari in the present case, the Court of Appeals for the Second Circuit has sustained an affidavit similar to the one here and held that it could be filed subsequent to the institution of suit. *United States* v. *Matles*, E.D.N.Y. unreported, No. 24435, decided June 10, 1957. However, Chief Justice Clark, speaking for the Court, acknowledged that the District Courts are sharply divided on the issue. The Second Circuit has since adhered to this ruling in *U. S.* v. *Luchese*, decided June 17, 1957. The issue is before the Ninth Circuit in *United States* v.

Diamond, supra; before the Seventh Circuit in *United States* v. *Minerich*, No. 12005; and is again before the Court of Appeals for the Sixth Circuit in *United States* v. *Laurenti*, No. 13292; but the latter Court, on June 17, 1957, stayed further proceedings on appeal pending determination of the questions by this Court in the instant proceeding.

In *Zucca*, this Court ruled in the penultimate sentence of its opinion (76 S.Ct. 26, 677):

> "We believe, that not only in some cases but in all cases, the District Attorney must, *as a prerequisite to the initiation of such proceedings*, file an affidavit showing good cause." (Emphasis ours.)

Petitioner contends that this holding clearly indicates that a legally sufficient affidavit is a jurisdictional requirement in the sense that, absent such an affidavit, no proceeding for denaturalization is authorized by the statute.

Zucca also made a distinction between the allegations to be made in the bill of complaint and the facts to be set forth in the required affidavit (76 S.Ct. 676):

> "The Complaint, under modern practice, is required merely to allege ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship."

Finally, *Zucca* emphasized that, notwithstanding the complaint there was verified by an Assistant United States Attorney and no part of it was alleged on information and belief, nevertheless this Assistant United States Attorney subsequently filed an affidavit stating that he had no personal knowledge of any of the facts set forth in the complaint and that his only knowledge or information was obtained by him "through files turned over to him for use

in preparation of the complaint" (76 S.Ct. 673, note 4). Thus, in effect, his verification of the *Zucca* complaint was the same as the affidavit here. In both cases there is an absence of personal knowledge of the facts and a reliance upon undisclosed "official" files.

In the affidavit here the affiant makes no claim that he had personal knowledge of the facts alleged. He states that he makes the affidavit as an attorney in the Immigration and Naturalization Service who had "access to the official records of the said Service" (App. C, p. A-13). He does not state that he has even read the official records nor that he believes his allegations with respect to them to be true. In paragraph 2 he sets forth the legal conclusions arising from the hearsay fact allegations in paragraph 1. And in paragraph 3 he merely concludes in the statutory language, "that good cause exists for the institution of a suit".

Petitioner contends that the reference by the Court in *Zucca* to the fact that the complaint was verified but still insufficient to satisfy the statute, indicates that an affidavit not based upon personal knowledge is legally insufficient. And this interpretation of *Zucca* is borne out by the interpretation which the minority attributed to this Court's holding:

> "As petitioner contends, 'good cause' means that the government must furnish the Court with sworn statements by persons having personal knowledge of the facts;" and that,
>
> "Apparently neither the United States Attorney nor anyone in the Immigration Service or the FBI can make such an affidavit unless he has personal knowledge of the facts."

The dissent further was of the view that:

> "At most it should be sufficient for an officer of the Immigration and Naturalization Service familiar with the case to make such allegations under oath."

In the present case it is apparent that the Court of Appeals here has adopted this minority view in *Zucca*, for the Court of Appeals specifically held:

> "In our judgment, the affidavit of an attorney of the Immigration and Naturalization Service of the United States Department of Justice reciting the facts appearing in the official records, such as the affidavit filed in each of these cases, was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case."

This, we think is an incorrect reading of *Zucca* for the following reasons:

First: The legal effect of the verified complaint in *Zucca* and the subsequent affidavit of the Assistant United States Attorney, places *Zucca* on "all fours" with the instant case with respect to the affidavit requirement. In each instance the verified allegations are merely conclusions reached by the affiant from his examination of unidentified "files" or "official records" of the Service. *Zucca* held that this was not sufficient because it did not set forth "evidentiary matters showing good cause for the cancellation of citizenship."

Second: *Zucca* makes it clear that the affidavit must be "evidentiary" in substance and not merely in form. To be "evidentiary", what is asserted must be presented by a witness who is competent, and must be of a quality that would be admissible at the trial of the cause. For in *Zucca* the verified complaint was, so far as the form of the allegations are concerned, at least as "evidentiary" as the affidavit

in this case. For example, what could be more "evidentiary" in form than paragraph 7 of the *Zucca* complaint, which alleged "that the said defendant was a member of the Communist Party of the United States * * * from 1925 to 1947?". Nevertheless, *Zucca* held this sworn allegation to be insufficient. The reason, as footnote 4 of the Court's opinion makes clear, was that the assertion represented the affiant's conclusions and was not based upon his personal knowledge. As such it is hearsay—perhaps two or three times removed—and would not have been admissible at the trial of the cause.[7]

The insufficiency of the affidavit here to fill the "evidentiary" gap found in *Zucca*, becomes evident from a comparison of the Complaint and affidavit in this case. As to all important matters they are the same. Indeed, much of the language is identical.[8] The affidavit contains nothing important that is not in the Complaint. It is, in effect, a pleading with another label. Unless the affidavit requirement is to be treated as a mere formality, it is difficult to see how its use in its present form would give any greater protection to the status of naturalized citizens than a Complaint without affidavit, as in *Zucca*.

Third: To sustain the affidavit here would be contrary to the spirit and intent of the affidavit requirement of the

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[7] Significantly, the *Zucca* affidavit does not describe the nature of the files and records allegedly consulted by the affiant. It is generally conceded, however, that such files and records consist not only of the statements of informers, so-called background information, but the impressions and conclusions of the investigator. See statement of J. Edgar Hoover quoted in Justice Clark's dissent in *Jencks* v. *United States*, 77 S. Ct. at p. 1020.

[8] Compare Par. 3 (a) (b) (c) and Par. 4 of Complaint with Par. 1 (b) (I, II, III, IV) of Affidavit. Note that Par. 6 (e) of Complaint refers to "sub paragraphs 1 (e), I, II, III, and IV" as does Par. 1 (e) (V) of the affidavit, although there are no such sub paragraphs in the Complaint.

statute as explained by the Court in *Zucca*. For in *Zucca* this Court stated (76 S.Ct. 676):

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded."

Yet, what is it but a "light regard" for the affidavit requirement, if a hearsay-on-hearsay affidavit is accepted? And how can a summary of some unidentified file material actually show "good cause" merely because the summary is notarized? For all that appears from the affidavit here, "the official records of the Service", which the affiant purports to have consulted, may be no more than "information acquired * * * from looking at hearsay statements in a F.B.I. dossier". (*Klapprott* v. *United States*, 335 U.S. 601, at 610.)

Fourth: The Government argued by analogy below that a criminal indictment may be founded upon hearsay. The dissent in *Zucca* argued the same analogy (76 S.Ct. 676). But this is true of indictments for historical reasons and because of the public policy inherent in not exposing Grand Jury proceedings to public scrutiny. In denaturalization cases a different public policy (as indicated in *Zucca*) has been announced by Congress. Hence, the analogy to indictments is misconceived. The correct analogy is not to indictments; rather, it is to other situations in which an affidavit of cause is required as a prerequisite to the institution of legal action. Among these are the extradition statute (Title

18, USC Sec. 3182), the Fourth Amendment and Rule 3 of the Federal Rules of Criminal Procedure. It has been held, almost uniformly, that the affidavit required in each of these instances must state facts of the affiant's own knowledge which would be admissible as evidence.

Extradition: See

Rafferty ex rel. Huie Fong v. *Bligh*, 55 F.2d 189, 194;
U. S. ex rel. McCline v. *Meyering*, 75 F.2d 716;
Ex Parte Morgan, 20 Fed. 298;
Riley v. *Colpoys*, 85 F.2d 282; and
People v. *McLaughlin*, 243 N.Y. 417, 193 N.E. 853.

Fourth Amendment: See

Sutherland v. *U. S.*, 92 F.2d 305;
Simmons v. *U. S.*, 18 F.2d 85;
Reeve v. *Howe*, 33 F.Supp. 619;
U. S. v. *Reynolds*, 111 F.Supp. 589;
U. S. v. *Office Number 508 Ricond-Brewster Building*, 119 F.Supp. 24;
Nathanson v. *U. S.*, 290 U.S. 41;
U. S. v. *Hill*, 114 Fed. Supp. 441; and
U. S. v. *Kennedy*, 5 F.R.D. 310.

Rule 3 of the Federal Rules of Criminal Procedure: See

U. S. v. *Baumert*, 179 Fed. 735;
U. S. v. *Lampdale*, 115 F.Supp. 489; and
U. S. v. *McCunn*, 40 F.2d 295.

Fifth: The ruling below is not only contrary to the letter of this Court's opinion in *Zucca*; it undermines the whole intent of that opinion. For it is apparent that this Court was concerned with effectuating the purpose of the Congress to give the utmost stability to decrees of naturalization and

thus assure to the new citizen the maximum protection for his claim of citizenship. This is evident from the Court's statement in *Zucca*, that:

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded" (351 U.S. 99-101).

Viewed in this light *Zucca* is readily recognized as a necessary supporting corollary to the standard of proof enunciated in *Schneiderman*, "clear, unequivocal and convincing evidence."

There is yet another reason why an affidavit setting forth the evidentiary facts, rather than summarizations or conclusions, is essential to the fair and proper administration of the statute. For, if the facts as set forth in the affidavit are insufficient, the issue can be raised and determined by the Trial Court upon Motion and before trial.

In *United States* v. *Candella*, 131 F.Supp. 249, the Court pointed out that the denaturalization court must, in the first instance, determine whether good cause exists. It said:

> "The implication we read is that denaturalization is to be determined by a Court, once it has been shown to a Court, that there is good cause to proceed to trial" (at p. 251).

If the Court is to judge whether or not good cause to proceed with denaturalization proceedings has been shown,

it can do so only on the basis of *facts* presented to it. To allow a United States Attorney to present an affidavit containing "ultimate facts", or hearsay information would substitute his judgment for the Court's as to the existence of good cause.

The suggestion in the *Candella* opinion that the Court is to pass upon the existence of good cause before proceeding with a denaturalization trial is in full accord with *Zucca*. For, if the filing of an affidavit showing good cause is a prerequisite to the institution and maintenance of the proceeding, as *Zucca* held, surely the Court must determine whether the prerequisite has been met, and therefore must determine whether good cause has been shown.

Finally, this Court's more recent opinion in *Jencks* v. *United States, supra,* reinforces this interpretation of *Zucca*. For the only justification for the contrary view is the desire to protect "the testimony and identity of undercover agents." (See dissent in *Zucca* and *Jencks*.) The need for such protection must be assessed in the first place, however, by the administrative or executive agency concerned. Where that agency has elected to disclose the nature of the information in its files by bringing the matter into Court, it thereby admits that the need for the privilege no longer exists. Cf. *U. S.* v. *Reynolds,* 345 U.S. 1, 112, quoted in *Jencks*. Under such circumstances "the public interest in a full and fair hearing . . . between individuals, and . . . their state calls for the . . . production and disclosure of relevant evidence within the control of executive departments and administrative agencies."

See Evidentiary Privileges against Production of Data within Control of Executive Departments, 3 Vander. L. Rev. 73.

II.

The Conclusion That Petitioner's Citizenship Was Fraudulently or Illegally Procured Is Unsupportable as a Matter of Law.

If, as we contend later (*infra*, pp. 60, 74) the evidence here fails to establish as a fact that the Communist Party, in the period prior to 1938, was an organization which taught and advocated the overthrow of the Government, or that Petitioner knew or had reason to know it as such, then the keystone of the Government's charge fails and the judgment below must be reversed.

But aside from the question of the sufficiency of the evidence to establish both of the above propositions, the conclusion as to fraud and illegal procurement is unsupportable here as a matter of law. There was no fraud because, even if Communist Party membership is assumed, the failure to voluntarily disclose such membership in 1938 did not amount to concealment. The charge of illegal procurement fails as a matter of law because, in the absence of fraud, the judgment of naturalization is *res adjudicata* as to the issues of attachment and good moral character—the two bases asserted for the charge of illegal procurement.

We first analyze and discuss the legal sufficiency of the charge of fraud; then we consider the sufficiency of the charge of illegal procurement.

A. The Charge of Fraud

The Complaint, as amended, sets forth three (3) instances of alleged fraud, only one of which was found by the Trial Court.

(1) That on December 15, 1937 in the course of his oral interview Petitioner was asked and falsely denied Communist Party membership.

(2) That on July 19, 1937, Petitioner falsely answered "No" to question No. 28 in his Preliminary Form. This question inquired: "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country."[9]

(3) That Petitioner's oath of allegiance, taken on June 18, 1938 was false.

The Trial Court expressly held that the first charge of fraud was not established; that the testimony of the Immigration Examiners to the effect that they had asked and Petitioner had denied Communist Party membership was not "clear, unequivocal and convincing" (App. p. 137).

The Trial Court made no finding with reference to the third charge of fraud—that Petitioner's oath of allegiance was false; probably because this charge apparently was abandoned by the Government at the trial (Tr. 19-31). The theory of this charge (Complaint, pars. 6 and 9, App. pp. 118, 120) appears to be that Petitioner, as an alleged member of the Communist Party, was subservient to the Communist International at Moscow; that such subservience amounted to allegiance to another state; and, hence, there was divided allegiance. The opinion of the Trial Court, however, effectively disposes of this theory for it recognized that renunciation of allegiance to another state was not involved when it said: "Indeed the rivalry here is not between land of birth and land of adoption, but between the latter and a political ideology" (App. p. 143). Thus, fraud in the oath of allegiance, the issue before this Court in

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[9] This allegation of the Complaint also relied on Q. 23 as well as Q. 28. But at the trial, the Government rested this claim solely on Q. 28 (Tr. 23) and the Trial Court, in its written opinion, assumed that this was the Government's claim.

Baumgartner v. *United States*, 322 U.S. 665 and *Knauer* v. *United States*, 328 U.S. 654, is not involved on this appeal. Cf. *United States* v. *Rossler*, 144 F.2d 463 (CA 2).[10]

Thus, there is left for consideration here only the second charge of fraud—Petitioner's negative answer to question No. 28 on his Preliminary Form.[11]

It is a familiar principle of law that a finding of fraud "is not to be lightly inferred" and must be predicated upon the intentional concealment of a material fact or a wilful misrepresentation of a material fact. See *United States* v. *Rovin*, 12 F.2d 942, 943. In either instance, the fact alleged to have been concealed or misrepresented must be a *material* one; and in cases of concealment, it must be a fact which was required to be disclosed. See 23 *Am. Jur.* "*Fraud and Deceit*" p. 892.

In determining whether Communist Party membership or the advocacy of that Party in 1938 was material on the issue of one's qualification for citizenship, we look first to the language of the 1906 Act, considered in comparison with later legislation on the same subject; and then to the intent of Congress as disclosed by the legislative history of this and other legislation in this general area.

The 1906 Act, as originally enacted (34 Stat. 597, 603; U.S.C., Title 8, Sec. 373) required the petitioner to state that he was not "a disbeliever in or opposed to organized

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[10] In both *Baumgartner* and *Knauer* it was pointed out that the most cogent proof of the new citizen's intent at the time of taking the oath was his conduct following the grant of citizenship. We have heretofore called attention to Petitioner's conduct as a member of the Michigan Legislature. (App., p. 107.)

[11] The allegation of fraud based on Petitioner's alleged disbelief in organized government (Complaint par. 3 (b) App., p. 117) was abandoned by the Government and was dismissed from consideration as an issue in the case by the Trial Court. (App., p. 136.)

government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government . . ." Subsequent amendments to the 1906 Act, prior to 1940, did not alter the language of this requirement. (Cf. Pub. Act No. 138, 76 Cong., Chapter 224—1st Session.)

The statutory form of Declaration of Intention, prior to the 1940 Act, provided for a statement by the applicant (34 Stat. 603-606) that: "I am not an anarchist". And the statutory form of the Petition stated:

> "I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government." [12]

The Nationality Act of 1940 (54 Stat. 1137; 8 U.S.C. 907) made substantial changes in the belief requirements for naturalization. Section 305 of that Act made the following pertinent change in the qualifications for citizenship:

> "No person shall hereafter be naturalized as a citizen of the United States—
>
> (a) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society or group that advises, advocates, or teaches opposition to all organized government; or
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any

[12] The statute as amended also authorized (45 Stat. 1515) the Commissioner of Immigration to "make such rules and regulations and such changes in the forms prescribed . . . as may be necessary to carry into effect the provisions of the naturalization laws." We deal with this provision later in this brief. (P. 36.)

organization, association, society, or group that believes in, advises, advocates, or teaches—

(1) the overthrow by force or violence of the government of the United States or of all forms of law; . . ."

. . . . . .

"The provisions of this Section shall be applicable to any applicant for naturalization who at any time in a period of ten years immediately preceding the filing of the petition for naturalization is, or who has been, found to be within any of the clauses enumerated in this Section, notwithstanding that at the time petition is filed, he may not be included in such classes."

This Court has held that the 1940 Act "does not in terms make Communist beliefs or affiliations grounds for refusal of naturalization . . ." (*Schneiderman, supra,* at p. 132, note 8; see also Justice Douglas' concurrence at p. 163.)

The 1940 Act was superseded by the Internal Security Act of 1950. This Act contained the first Congressional enactment barring "Communists" as such from citizenship. 64 Stat. 1015. And this bar is continued in the later Immigration and Nationality Act of 1952. (Section 313 (a) (2).)

Thus, from a comparison of the language of the 1906 Act in effect at the time of Petitioner's naturalization and subsequent enactments on the subject, it is apparent that the thrust of the belief qualifications applicable at the time of Petitioner's naturalization in 1938 was addressed at anarchists or polygamists and referred neither to Communists nor believers in "the overthrow of existing government in the United States."

The legislative history of the 1906 Act demonstrates that this failure to refer therein to Communists or to "advocacy of overthrow of the government" was intentional. For

these belief qualifications of the 1906 Act, in turn, derived from Section 39 of the 1903 Act (32 Stat. 1222).[13] This section was tacked on to the 1903 Act by the Senate a few days before passage of that Act. It was accepted by the Congress, the conferees saying:

> "The Senate added two sections of the bill (Amendments 114-115), containing what is known as the anarchist provision. This embodies the most important features of a House bill favorably reported by the Judiciary Committee of the House. The House Conferees agreed to this amendment."

Sec. 39 of the 1903 Act was the only section dealing with naturalization. It was identical with a proposal in a 1902 bill and provided "no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government . . . shall be naturalized or be made a citizen of the United States."[14]

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[13] Prior to the 1903 Act there were no belief qualifications for naturalization. See Acts of April 14, 1802 and May 26, 1824.

[14] This provision of the 1902 bill and the 1903 Act grew out of the assassination of President McKinley. In his annual message for 1901, President Theodore Roosevelt recommended exclusion and deportation of alien "anarchists, or persons professing principles hostile to all government." He wrote:

> "President McKinley was killed by an utterly depraved criminal belonging to that body of criminals who object to all government, good and bad alike."

In discussing the 1902 bill, the House Judiciary Committee in its report recommending such legislation stated:

> "We seek also to shut out, those who seek to enter this country and who are opposed to organized government. We also forbid the naturalization of such persons."
>
> "We have no place for those who believe in or teach murder or who are opposed to *all gavernment*. Good men oppose, and justly, certain governments and their administrations." (Italics in original.)

It is clear, therefore, that Congress, in enacting the 1906 Act, intentionally limited its political proscription to anarchists—to those who disbelieved in *all* organized government.

The Trial Court so held (App. p. 136). However, in concluding that Petitioner's failure to voluntarily disclose his alleged Communist Party membership in 1938 constituted concealment amounting to fraud, the Trial Court quotes from a 1918 statute which excluded from our country aliens who are members of organizations which "advocate the violent overthrow of the government of the United States or of all forms of law" (App. p. 141). It is not clear from the Court's opinion what significance it attached to this alien exclusion statute insofar as naturalization was concerned. If the statute is cited to show the materiality of party membership on the issue of naturalization, we think the citation miscarries.

In our view the statute serves to highlight the distinction which Congress intentionally made in setting forth the belief qualifications for naturalization and those for exclusion or deportation.[15]

Prior to the 1940 Act, as we have seen, there existed no reference in any naturalization statute to the concept of "advocacy of overthrow of the government of the United States." On the other hand, this concept had been a part of our exclusion and deportation statutes at least since

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[15] The distinction has a constitutional basis in that resident aliens enjoy the constitutional guarantees of the First and Fifth Amendments. *Bridges* v. *California*, 314 U. S. 252. But the power to exclude is plenary (*U. S.* v. *Williams*, 194 U.S. 279) and can be exerted for any reason against non-resident aliens and those seeking admission to our shores. It is uninhibited by the Bill of Rights or the constitutional requirement of a "uniform rule" of naturalization.

1903;[16] and it was employed by Congress *in addition* to the proscription against anarchy.

And even though both of these belief proscriptions existed in our exclusion and deportation statutes, the consensus among members of Congress concerned with such legislation was that neither of these proscriptions applied to Communists. Thus, in 1932 and again in 1935, proposals were made in Congress to amend these statutes so as to make them applicable in terms to the Communist Party and to its members. The change was recommended for the very reason that neither the prohibition against anarchists nor the prohibition against advocates of violent overthrow reached membership in the Communist Party. Thus in Report No. 1023 to accompany H. R. No. 7120, 74th Congress, 1st Session, May 27, 1935, Mr. Starnes for the House Committee on Immigration and Naturalization states:

> "The acts above cited, of 1918 and 1920 centered around the anarchist idea of 'opposition to all organized government.' On that basis alone Communist or Fascist aliens differ in that while they may be imbued with 'opposition to non-Communist governments or opposed to non-Fascist governments' they are not 'opposed to all organized government'. This decided differentiation of the subversive activities dominating 'anarchists, Communists, and Fascists' renders necessary the enactment by Congress of a bill of this character in order to enable our Immigration and Naturalization

[16] Section 2 of the 1903 Act excluded from admission into the United States, not alone "polygamists" and "anarchists," but as well "persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials." Similar proscriptions of "advocacy of overthrow" are to be found in the 1917 statute making it a crime to aid such advocates in entering the country (39 Stat. 894); and the 1918 statute (41 Stat. 1008) quoted by the Trial Court.

Service to have a statute to guide them in handling the cases of Communists and Fascists."

The bill failed to pass. (See *Schneiderman*, p. 132, note 8.)

A similar bill had been introduced and failed of passage three years earlier in the 1st Session of the 72nd Congress. Section 2 of the bill (H.R. 12044) contained the following definition of a Communist:

"A 'Communist' within the meaning of this act shall mean any alien who is a member of or affiliated with any organization which, or any alien who, believes in, advises, advocates, or teaches (1) the overthrow by force or violence of the U.S. or (2) of the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury, or destruction of property or (4) sabotage, or (5) a doctrine which advocates the overthrow by force or violence of governments, constituted authority, or social order, existing in countries not under the control of communists and the establishment in place thereof of (a) a regime termed 'proletarian dictatorships' and/or (b) a system based upon the common ownership of property and abolition of private property, provided that the platform, program, and/or objectives of the Third International or Communist International shall be held to embrace the said doctrine. No alien shall be held to be a communist under the provisions of this Act if he shall prove he became a member of such organization on account of fear, duress, compulsion, misrepresentation, or fraud."

Congressman Dies in his report on the bill for the Committee on Immigration (H. Rep. 1352, 72nd Congress, 1st Session) wrote:

> ". . . The Committee deemed it necessary to define a Communist. The classical or dictionary definition of a Communist does not conform to the radical and revolutionary type of an alien Communist which the Committee is seeking to exclude and expel from this country.
>
> "Therefore, the Committee has made it plain that the proposed bill will not affect any alien who merely subscribed to a doctrine which advocates a system based upon common ownership of property or abolition of private property, unless such alien believes in, advises, or advocates the establishment of this system by force or violence. This definition will therefore exempt any organization or alien who, although subscribing to the doctrine of a system of common ownership of property and the abolition of property or the common ownership of the means of production, does not believe in, advise, or advocate the establishment of this system by force or violence."

Such was the legislative history of the belief sections of our exclusion and deportation laws as distinct from our naturalization laws prior to 1940. Not until the Nationality Act of 1940 did Congress include in the naturalization statutes not only a restriction against naturalization of anarchists but also a restriction against naturalization of persons who advocate or belong to organizations which advocate the overthrow of government "by force or violence." [17]

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[17] Later in this Brief (p. 101) we consider the First Amendment problem which arises from any interpretation of Question 28 as an inquiry into advocacy of "overthrow" unaccompanied by language inciting to force and violence.

In the debates on the 1940 Act this change was explained on the ground that Communists could thereafter be denied naturalization although previously only anarchists had been barred.[18]

There are at least two (2) conclusions pertinent here which flow from this summary of the legislative history of the belief provisions of the immigration and naturalization laws as they existed in 1938. The first is that Congress did not, in 1938, regard membership in the Communist Party as material on the issue of one's qualifications for citizenship. And it follows from this that failure to voluntarily disclose alleged Communist Party membership was not concealment of a material fact. Hence, there was no fraud.

There is, however, a second conclusion to be drawn which is equally determinative of the issue of fraud, and that is that nothing in the naturalization laws as they existed in 1938, authorized the Immigration Service to inquire into any prospective petitioner's political beliefs—aside from his belief in anarchy or membership in an organization advocating anarchy. And if there was no authority to inquire, there was no duty to voluntarily disclose.

In further support of this second conclusion, it is significant, we think, that nowhere in either the statutory form

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[18] Mr. Rees, of Kansas, acting subchairman of the sub-committee of the House Committee on Immigration, in explaining the 1940 Act, answered a question of Mr. Morrell about cancelling the citizenship of a person who had become a "believer in the philosophy of communism," or had become "a strong advocate of these foreign 'isms.'" Mr. Rees said:

> "The old law denies citizenship to anarchists, believers in polygamy and some other classes. Under this bill, we believe we have covered the question of fascism, nazi-ism, communism or any other 'ism' although they are not specifically mentioned by name. Provision is made for careful investigation into the applicant's attitude in these matters, both at the time he filed his declaration of intention and when he takes out his final papers." (86th Congress, Rec. 11949.)

of Declaration of Intention nor the Petition for Naturalization set forth in the 1906 Act (34 Stat. 603-606) does Congress include any inquiry concerning advocacy of "overthrow"; though in both instances it required a negation of anarchy. The Act required (Section 27) that "substantially the following forms shall be used".

Under Section 28 of the Act the Immigration Service was granted authorization "to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this Act (34 Stat. 606), but neither this section nor any other section in terms authorize any changes in the statutory forms.

The Act of March 2, 1929 (45 Stat. 1515) amended the rule-making power of Section 28 of the 1906 Act to include the words "and such changes in the forms proscribed by section 27 of this Act as may be necessary". But this amendment was not regarded by the Service itself as authorization to amend the "anarchy" provisions in the statutory forms so as to inquire concerning advocacy of "overthrow". Thus, the Petition here (Gov't Exh. 2, App. p. 133) follows the statutory form and in paragraph 7 refers only to "disbelief in or opposed to organized government".

Question No. 28 appears in the "Preliminary Form for Petition for Naturalization" (Gov't Exh. 1, App. p. 129); and neither the authorization for this form nor the interpretation of Question 28 has ever been ruled on by this Court.[19]

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[19] This Preliminary Form was not in use in 1927, at the time of naturalization of *Schneiderman*; at least it does not appear nor is there any reference to it in the record in that case (pp. 72-75). The form is not a part of the naturalization record filed with the District Court. Its execution appears to have been first required by Rules 3 and 7 of the Rules of the Service, effective December 1, 1936. The practice seems to have been to use the form as a means of collecting information from the prospective petitioner to be used by the Service in aiding the petitioner to complete the statutory form of Petition. As such the form is a "working paper" for the Service.

If the Service regarded disclosure of alleged Communist affiliation or "advocacy of overthrow," to be material in 1938; and if it interpreted the 1906 Act as authority for making such inquiry, then it is strange that it did not change the form of the Statutory Petition so as to require such information.[20] Here, not only is such inquiry not contained in the Petition (App. p. 133) but the Trial Court has found that no such inquiry was made orally (App. p. 136).

The Trial Court, however, after expressly finding that Petitioner was not specifically asked concerning alleged Communist Party membership, concluded, nevertheless, that Question No. 28 should have been interpreted by Petitioner as an inquiry concerning Communist Party membership and should have evoked from him an admission of such membership.[21] There is thus presented for determination by this Court the question of the proper interpretation to be given Question No. 28.

Question No. 28 is in two parts, each of which Petitioner answered in the negative:

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[20] The petition for Naturalization set forth in the 1940 Act (54 Stat. 1154-1156; 8 U. S. C. 732) likewise contains no inquiry concerning "advocacy of overthrow." But that Act provides that "in addition to the statutory form, the Petition 'shall include averments of all other facts which may be material to the applicant's naturalization and required to be proved upon the hearing of such Petition.' Moreover, this Act reflects Congressional concern over the scope of such inquiry and provides that examination by the Service . . . shall be limited to inquiry concerning the applicant's residence, good moral character, understanding and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law . . . " 54 Stat. 1151; 8 U. S. C. 727.

[21] There is a measure of inconsistency in the Government's position. On the one hand it takes the position that Question 28 was designed and intended to solicit information from the applicant as to Communist Party membership. On the other hand, the Government went to considerable lengths, unsuccessfully, to attempt to prove that the Applicant was orally asked the specific question which it now asserts was included in Question 28.

"Are you a believer in anarchy?

Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?"

Since, as we have seen, a belief in communism is not to be equated with a belief in anarchy, the first portion of Question No. 28—"Are you a believer in anarchy"—was obviously truthfully answered by Petitioner and, hence, there was no misrepresentation there.

We come then to the second part of Question No. 28: "Do you belong to or are you associated with any organization which *teaches or advocates anarchy or the overthrow of existing government in this country?*" (Emphasis ours.) The question arises whether this second part of Question No. 28 necessarily imported to a reasonable person in 1938 an inquiry concerning membership in the Communist Party? If the question is susceptible of two equally reasonable interpretations, one of which would predicate guilt and the other innocence, *Schneiderman* (at p. 158) requires that the innocent interpretation be accepted. See also, *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221-222.

The second part of Question No. 28 is reasonably susceptible of two interpretations: an inquiry concerning anarchy *alone* or an inquiry concerning *both* anarchy and "belief in overthrow of existing government in this country". If Question No. 28 is construed to accord with the Congressional intent as shown by the preceding legislative history, then it has but one purpose: to inquire into the Petitioner's beliefs on the subject of anarchy—opposition to all organized government; and the additional words "overthrow of existing government" constitute merely the questioner's free-hand translation of the word "anarchy". This follows because, as we have seen, Congress prior to 1938 had repeatedly refused to amend the statute so as to refer to "advocacy of overthrow".

Now, if this construction of Question No. 28 is the proper construction, then the answer given by the Petitioner as we pointed out above, was a truthful answer and there was no misrepresentation. For, as we have seen, even if it be assumed that Petitioner was a member of the Communist Party, that Party was never regarded by Congress as an organization teaching and advocating anarchy.[22] Hence, membership therein did not make one a believer in anarchy or a member of any organization teaching and advocating the theories of anarchy.

The situation thus presented is analogous to that recently before the Court of Appeals for the Third Circuit in the denaturalization case of *United States* v. *Kessler*, 213 F. (2d) 53 (1954). The Government there charged that the defendant committed fraud when she answered "No" to the question in her Petition for Naturalization "Have you ever been arrested or charged with the violation of any law of the United States or any city ordinance or traffic regulation?" It was further charged that defendant had been arrested for "obstructing highway" and had been discharged seventeen times prior to her naturalization. Defendant's contention was that each of these "arrests" was

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[22] The Trial Court itself recognized the distinction between anarchy and Communism when it said (App., p. 136): " . . . seldom, if ever, has dispensation with all government been considered a tenet of communism." See also the dissent by J. Pound, concurred in by J. Cardozo in *People* v. *Gitlow*, 234 N. Y. 132. The question was not considered on the later Supreme Court review in *Gitlow* v. *New York*, 268 U. S. 652. See also *Encyclopaedia Britannica* 12th ed. 1926, Vol. 1, p. 692: " . . . Communism in its form is closely allied to syndicalism but not to anarchism as is often falsely maintained."

This interpretation of Question 28 is also consistent with the Government's contention in the 1942 indictment that Petitioner had concealed membership in an organization teaching *"disbelief in organized government,* to wit: the Communistic Party" (App., p. 115). If the Government or the grand jury could adopt that interpretation in 1942, Petitioner should not be penalized because the Government adopted a different interpretation in 1952.

illegal since there was no such offense, and that, therefore, her negative answer was a truthful one in that a reasonable interpretation of the question would exclude inquiry concerning "illegal arrests".

The appellate court held that the defendant's "asserted interpretation of the scope of the question was a reasonable one for she had been informed by [the magistrate] seventeen times, and by counsel for her union on numerous occasions, that she had committed no crime cognizable at law."[23]

Assuming that the interpretation placed by the Government on Question 28 is a possible one, the Government must prove that Petitioner *knew* or should have known the question was intended to include inquiry as to Communist Party membership. For, in a revocation proceeding based on fraud "it is necessary for the government to prove that the said testimony of the applicant was *intentionally* false". *United States* v. *Tuteur*, 215 F.2d 415. In that case, the District Court had granted the Government's motion for summary judgment on a denaturalization Complaint which alleged that the petitioner had failed to mention the USSR Embassy Bulletin in answer to a question asking applicant to list periodicals received from a foreign agency, and had also failed to mention the *New Masses* and other publications in answer to a question asking petitioner to list all subscriptions to pamphlets, etc. The Appellate Court re-

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[23] Actually, the situation in *Kessler* case, *supra*, was less favorable to the defendant's contention there than is the case here. For in *Kessler* the ambiguity related to a question of law; what is an "arrest." Here the ambiguity is factual; it concerns the intent of questioner and the extent to which he has succeeded in making the intent of his question clear to the petitioner. In any event, however, the ambiguity of Question #28, is such that a charge of perjury could not be predicated upon an alleged incorrect answer; neither would contempt follow a refusal to answer. See *Lattimore* v. *United States*, 215 F. 2d 847 (C. A., D. C.) and *O'Connor* v. *United States*, 240 F. 2d 404 (C. A., D. C.).

versed, holding that "the government—must allege and prove fraud in which *an essential element is intent*".

In the absence of testimony to show that Petitioner interpreted Question 28 as the Government now contends, the standard of proof placed on the Government by *Schneiderman* would appear to foreclose a finding of fraud, based on such ambiguity.

Finally, we submit that the interpretation of Question 28 for which we contend is the only interpretation which avoids both the constitutional issue presented by the vagueness of the claimed authority for making the inquiry into political beliefs outside the area of anarchy, on the one hand (See *Jordan* v. *DeGeorge*, 341 U.S. 223, 231, 71 S.Ct. 703; Cf. *Sweezy* v. *New Hampshire*, 77 S.Ct. 1203; and *Watkins* v. *United States*, 77 S.Ct. 1173); and, on the other, prohibitions of the First Amendment against any strictures upon the advocacy of overthrow of government unaccompanied by language inciting to force and violence. (See *Stromberg* v. *California*, 283 U.S. 359; *Herndon* v. *Lowry*, 301 U.S. 242, 259, 57 S.Ct. 732, 739.) Such a construction is therefore favored. *Crowell* v. *Benson*, 285 U.S. 22, 62; *Ashwander* v. *T.V.A.*, 297 U.S. 288, 348, note 8.

B. The Charge of Illegal Procurement

The charge of illegal procurement is predicated upon the allegation that Petitioner, in the five year period prior to naturalization, had not "behaved as a person of good moral character, attached to the principles of the Constitution". And this conclusion is in turn based upon the allegation that Petitioner was a member of the Communist Party; that the Party, to his knowledge, was a proscribed organization; and that he failed to disclose such membership. The charge thus presented is precisely the one which was before this Court in *Schneiderman*.

Our analysis of *Schneiderman* (*infra*, p. 48) demonstrates that factually the case there was stronger for the Government's contention.[24] If the record in *Schneiderman* was insufficient to establish the charge of lack of attachment and good moral character, *a fortiori*, the record here is insufficient.[25]

The finding as to illegal procurement, however, is susceptible of the interpretation that what the Court actually is referring to is not alleged membership in the Party *per se* as the disqualifying factor but rather the failure to voluntarily disclose such membership in response to Question No. 28 (App. p. 141). If that is so, then the basis for denaturalization is not "illegality": it is fraud. And our discussion herein (*supra*, p. 16) of the issue of fraud, has demonstrated that such failure did not amount to fraud.

Aside from this, however, the charge of "illegality" must fail as a matter of law because the judgment of naturalization is itself a judicial determination of the issues of attachment and good moral character in the period involved. Any

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[24] Schneiderman admittedly was a member of the Communist Party at the time of his naturalization in 1927 and had been a student of communism ever since he became a charter member of the Young Workers League in 1922, at the age of sixteen. He was "educational director" of the League, and also had served as corresponding secretary of the Party in Los Angeles. Admittedly, he had read or was familiar with most of the "Marxist" books and other Party literature. *Schneiderman*, 320 U. S. at pp. 125-126, 183-185. No such Communist Party activity is shown here with respect to Petitioner.

[25] In *Konigsberg* v. *California*, 77 S. Ct. 722, where the burden was on the applicant for admission to the bar to prove his good character and not, as here, on the Government to prove that Petitioner's prior behavior could not support a finding of good moral character, the Court held that "the mere fact of membership would not support an inference that he did not have good moral character," referring to *Schneiderman* in the accompanying footnote 25 at p. 730.

subsequent judicial determination of this same issue necessarily assumes that the later Court possesses the power to reexamine the factual issues and overrule the factual findings made by the naturalization court. In this case re-examination occurs almost twenty years after the time of Petitioner's naturalization.

A question thus is presented whether or not the denaturalization statute by its terms or necessary implication authorizes a new trial of issues already judicially determined.[26] The answer depends upon a proper construction of the statutory requirements of good moral character and attachment. Does the statute mean that each petitioner must possess these attributes as an objective fact on which all courts and all judges at all times must agree? Or does the statute mean that, at the time of his naturalization, the naturalization court must find as a fact, not contradicted on the face of the record, that in the period prior to naturalization, the Petitioner had behaved as a man possessed of these attributes? We submit that the statute must necessarily mean the latter; otherwise the judicial findings underlying naturalization are never settled; and their finality will vary according to the particular court and the particular climate in which their re-examination is sought. Cf. *Meyer* v. *United States*, 141 F.2d 825.

The question of the application of the principle of *res adjudicata* to judgments of naturalization has occasioned much discussion and much conflict in the decisions of the

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[26] If this question is answered in the affirmative, the further constitutional question is present: Does such purported Congressional authorization violate Article III of the Constitution? See concurrence of Justice Rutledge in *Schneiderman*, 320 U. S. at page 165. This issue has not heretofore been decided by this Court; but cf. *United States* v. *Pandit*, 15 F. 2d 285, 286, cert. den. 273 U. S. 759, 47 S. Ct. 473.

lower courts.[27] While the issue has been raised in this Court on several occasions, it has never been squarely determined with reference to a naturalization proceeding in which the Government was authorized to appear with the full rights of a litigant and where the record of the naturalization proceeding did not disclose on its face the absence of some condition precedent to the power of the Court to act.

Thus, *Johannessen* v. *United States*, 225 U.S. 227, 38 S.Ct. 118, involved an *ex parte* judgment of naturalization to which the doctrine of *res adjudicata* did not apply; in *United States* v. *Ness*, 245 U.S. 319, 38 S.Ct. 118 there was an admitted failure by petitioner to accompany his petition with the required certificate of arrival; and in *Maney* v. *United States*, 278 U.S. 17, 49 S.Ct. 15, the required certificate of arrival was filed after the filing of the petition.[28]

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[27] The Senate Report (S. Rep. 1515, 81st Cong., 2d sess. (1950)) concerning proposed changes in the denaturalization statute refers to the "conflict as to the res judicata status of naturalization proceedings where the government had appeared as an adverse party" (51 *Mich. L. R.* 881, 893); and the elimination in the 1952 Act of the ground of illegal procurement is generally accepted as evidencing a Congressional intent that attachment and good moral character not be reexamined in the absence of "concealment of a material fact or wilful misrepresentation." See 66 *Har. L. R.* 643, 719.

[28] The question apparently was not raised in the following cases: *United States* v. *Ginsberg*, 243 U. S. 472, 37 S. Ct. 422 (absence of statutory residence conceded); and *United States* v. *Thind*, 261 U. S. 204, 43 S. Ct. 338 (where the statutory requirement that the applicant be a "white person" was held, as a matter of law, to make a Hindu ineligible for citizenship). *Luria* v. *United States*, 231 U. S. 9, 34 S. Ct. 10, concerned petitioner's failure to comply with a statutory condition subsequent to naturalization; petitioner's departure, and continued absence from the country shortly after naturalization, warranted the invocation of the statutory presumption that he lacked the requisite intent to remain here permanently.

Petitioner contends that the doctrine of *res adjudicata* applies to a judgment of naturalization in the same manner and to the same extent as it applies to any other judicially litigated proceeding (see *Johannessen* v. *United States*, *supra*); and further, that the grounds for denaturalization stated in the 1906 and 1940 Acts (*supra*, pp. 3-4) were but declaratory of existing law. Judgments, of course, are assailable for fraud. They likewise are assailable where it appears on the face of the record in the proceeding that the Court which purported to act lacked the power to act. In such cases the purported judgment is a nullity. *United States* v. *Ness*, *supra*.

The construction which we propose for the statute avoids the possibility of conflict with Article III of the Constitution as noted by Mr. Justice Rutledge in his concurrence in *Schneiderman*, *supra*, at p. 165. It also conforms with the better reasoned cases in the lower Courts. (*United States* v. *Pandit*, 15 F.2d 285 (C.A. 9th), cert. den. 273 U.S. 759, 47 S.Ct. 473; *Meyer* v. *United States*, *supra*, *United States* v. *Nechman*, 183 Fed. 789.) These cases have applied the principle of *res adjudicata* in holding that, absent fraud, the naturalization court's finding as to residence and age (*United States* v. *Nechman*, *supra*); or racial background (*United States* v. *Pandit*, *supra*), or good moral character and attachment (*Meyer* v. *United States*, *supra*) may not be re-examined under a claim that its judgment was "illegally procured". A different result is warranted only where the "uncontradicted evidence" before the naturalization court or the admissions of the party show "indisputably" that the naturalization court "misapplied the law" and assumed to act where it had no authority to do so under the statute. *United States* v. *Ginsberg*, 243 U.S. 472, 37 S.Ct. 422, *Schwinn* v. *United States*, 311 U.S. 616, 61 S.Ct. 70, affirming 112 F.2d 74. See also *United States* v. *Simons*, 170 Fed. 680 (D. Mass.).

But of far greater importance, we think, is the fact that a contrary interpretation would mean that citizenship by naturalization is always a conditional grant, revokable almost at will, depending only upon the political climate. This, of course, is incompatible with our national concept of equality of citizenship. Moreover, if there are any "jurisdictional requirements" set forth in the statute which imperatively call for application of the principles of *res adjudicata*, they are precisely those of "good moral conduct" and "attachment". These qualities are subjective and often debatable; they are in the realm of opinion and their determination, one way or the other, is likely to depend upon the political or moral climate of the community and the predilections of the person charged with making the determination. The care with which Congress has set forth the procedure for pre-naturalization examination (cf. discussion in *Biudczyck* v. *Finucane*, 342 U.S. 76) indicates, we think, an intention that this determination should be made by the naturalization court. That court is closer, both in terms of the critical pre-naturalization period and the geographic area in which the petitioner has lived and acquired his reputation, than any denaturalization court is likely to be.

Finally, we believe that the view for which we contend already has become the accepted view of this Court. The question of whether findings of attachment and good moral character could be re-examined and set aside in a denaturalization proceeding based on "illegal procurement", while noted in the majority opinion in *Schneiderman* (at pp. 123-125), was not reached by the Court. However, the question was the subject of Mr. Justice Douglas' concurring opinion at p. 161. He expressed the view that it is the *finding* made by the naturalization court which constitutes the "condition precedent" to naturalization, and not the actual possession

of these subjective attributes by the petitioner. Therefore, he concluded (pp. 162-163):

> "It is my view that Congress by that provision made the finding the condition precedent, not the weight of evidence. Such a finding can of course be set aside . . . on the grounds of fraud".[29]

Later, in *Knauer* v. *United States*, 328 U.S. 654, Mr. Justice Douglas wrote for the Court. The issue was fraud in the taking of the naturalization oath. The rationale upon which the Court decided this issue adversely to the petitioner, supports the view that the findings of good moral character and attachment, if untainted by a showing of fraud, cannot be re-examined. The Court said:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the *establishment of which Congress has made conditions precedent to naturalization.* Those facts relate to the past—to behavior and conduct. But the oath is in a different category. . . . The oath being the final step, no evidence is heard at that time . . . Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become res judicata in the decree songht to be set aside. For fraud in the oath was not an issue in the proceedings and neither was adjudicated nor could have been adjudicated." (Emphasis supplied.) (*Knauer*, at p. 670.)

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[29] The reference is to the 1906 Act (34 Stat. 598) prior to its amendment (45 Stat. 1513-1514) in 1929. The latter amendment deleted the words "it shall be made to appear to the satisfaction of the Court" . . . The change does not affect the logic of the argument.

Since, as we have demonstrated above, there was no fraud committed by Petitioner here, and the issue of attachment and good moral character was determined by the naturalization court in a judicially-litigated proceeding where all parties were represented, the judgment of naturalization is final as to these issues and the conclusion of the court below as to "illegal procurement" is erroneous as a matter of law.

III.

The Evidence Is Insufficient to Warrant Cancellation of Petitioner's Citizenship.

A. Introduction

Before entering upon a discussion of the specific evidence presented by the Government we deem it pertinent to review briefly the framework within which the reliability as well as the sufficiency of that evidence is to be tested. This necessitates first, a brief review of this Court's holding in *Schneiderman;* second, a consideration of the time lapse between the date of Petitioner's naturalization in 1938 and the institution of the present proceeding and the necessary effect of this in applying the *Schneiderman* standard of proof; and third, the effect of the Government's dismissal of earlier criminal proceedings against this Petitioner involving the identical factual issues presented here.

1. *The significance of Schneiderman.*

Not since 1943, in *Schneiderman* v. *U. S.*, 320 U.S. 118, has this Court had occasion to review a judgment of denaturalization based upon a finding of Communist Party membership. In two decisions subsequent to *Schneiderman*—*Baumgartner* v. *U. S.*, 322 U.S. 665 (1944) and *Knauer* v. *U. S.*, 328 U.S. 654 (1946) this Court reviewed denatural-

ization judgments revoking grants of citizenship made in 1932 and 1936 respectively. However, these decisions involved the issue of fraud in the oath of citizenship taken after the judgment of naturalization. They arose out of the Government's claim that *Baumgartner* and *Knauer* had not intended to forswear allegiance to Germany.

The question of fraud was not before this Court in *Schneiderman;* the only issue being "illegal procurement". This issue was predicated on the Government's charge that *Schneiderman's* membership in the Communist Party was inconsistent with the statutory requirements of attachment to the Constitution and good moral character.

Despite these differences in the legal issues, all three cases were decided by this Court by applying the high standard of proof required of the Government in a denaturalization case—"clear, convincing and unequivocal" evidence.[39]

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In the present case the Government charges both fraud and illegality against Petitioner. However, as we point out in our analysis of the pleadings and proofs, the underpinning for both grounds is the Government's claim that Petitioner was a member of the Communist Party with knowledge that it was an organization teaching the violent overthrow of the United States Government and that he failed to disclose this. In this respect the factual issues in *Schneiderman* and *Nowak* are the same.

The burden of our argument is that the Trial Court erred in its decision in this case because it failed to properly apply the *Schneiderman* rule in its evaluation of the evidence and in its findings and conclusions. This error

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[39] The rule is derived from and is the same as that applicable to suits to revoke Government land grants. See discussion and cases cited on pp. 13-14 of Petition for Certiorari in *Schneiderman.*

arises, not because the Court overlooked the *Schneiderman* standard; it was duly given formal recognition. Rather, the error arises because the Trial Court failed to apply the standard in the spirit in which it was conceived—as a judicially administered safeguard, vital to maintain the status of a naturalized citizen on the same high level of individual freedom and dignity as that of a natural citizen.

An analysis of the *Schneiderman* facts and issues, by disclosing the circumstances under which the rule was there applied, will aid, we think, in revealing the absence of its proper application in this case.

Schneiderman came to this country at the age of three in 1907 or 1908. He was naturalized in 1927. The denaturalization proceeding was begun in 1939 and charged both illegal procurement and fraud; illegality in that, for five years prior to his naturalization, he had been a member of the Communist Party and Young Communist League, organizations which, it was alleged, taught and advocated the violent overthrow of the United States Government, and that, therefore, he had not behaved as a person attached to the principles of the Constitution; fraud in that he had concealed his Communist affiliation from the naturalization Court.

Schneiderman, called by the Government as a witness, testified and readily admitted not only long standing membership in the Communist Party, but active leadership in the top circles of the Party before and after his naturalization; he admitted not only knowledge of Marxist theories, but that he had subscribed to their application in the United States by the Party and had for many years been engaged in teaching and supervising the teaching of those doctrines in the State of California. He affirmed his personal belief in the principles of socialism as enunciated in Lenin's writings and as he understood them. The Government relied

on Schneiderman's own testimony, on the testimony of two "expert" witnesses, who had been members of the Communist Party, to the effect that the Party advocated violent overthrow, and on selected quotations from books written by Marx, Engels, Lenin and Stalin, with which Schneiderman was identified.

After a careful review of the evidence, this Court found that "under the conflicting evidence in this case we cannot say that the Government has proved by such a preponderance of the evidence that the issue is not in doubt, that the attitude of the Communist Party of the United States in 1927 toward force and violence was not susceptible of classification in the second category", i.e., justification of force in the future as distinguished from advocacy of present action. The Court also concluded that, absent a showing of overt acts by Schneiderman, the District Court was "not justified in . . . imputing the reprehensible interpretation" of the Communist Party program to him.

2. *The effect of the lapse of time in bringing these proceedings.*

The proofs as to the teachings of the Communist Party are basically identical in *Schneiderman* and *Nowak*. They consist of the books, and opinions of former Party members accepted by the Trial Court as "experts". As to proof of knowledge and acceptance of these teachings by the naturalized citizen, the Government's burden in *Schneiderman* was considerably lightened by his admission of long, close and active association with the Communist Party in a leading capacity and his full acceptance of its teachings and literature. Because of the striking lack of such evidence of personal knowledge and acceptance in this case, the Government and the Trial Court here relied heavily upon isolated statements attributed to Petitioner and allegedly made six-

teen or more years earlier, in conversations and speeches as proof of knowledge and acceptance.

It is particularly in this area of the proofs—where the deficiencies found in *Schneiderman* are so profoundly apparent in this case—that the failure of the Trial Court to find them totally lacking in the quality necessary to satisfy the *Schneiderman* standard can only be ascribed to hostile contemporary attitudes concerning communism which prevailed at the time of this trial.

The failure to apply this standard in measuring the evidence in the *Nowak* case does not merely result in a loss of his citizenship, but weakens the status of millions of citizens now living who were naturalized in the 1930's, the period involved in this case.[31] If their citizenship can be revoked years later, after leading useful—even exemplary lives, on the strength of the kind of evidence found sufficient here, then their status would indeed "rest upon a slender reed". (*Schneiderman* at p. 159.)

This threat to their status, subtle as it may be, is not unreal.[32] For a great many of these naturalized citizens, most of them working people, lived through the same period of mass unemployment and political change as Petitioner. And it was that period, and activities indigenous to that period, toward which the Government's evidence was di-

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[31] There were 7,280,265 naturalized citizens in the United States in 1940. This number had increased to 7,471,898 in 1950, the last census. However, since 1,987,028 persons had been naturalized between 1940 and 1950, there must have been 5,484,870 living citizens in 1950 who had been naturalized prior to 1940. (Source, U. S. Bureau of the Census.)

[32] On March 18, 1953, the Attorney General of the United States in an address to the 169th Annual Dinner of the Friendly Sons of St. Patrick at New York City, stated that the Department of Justice had 10,000 naturalized citizens under investigation for possible deportation as subversives. (New York Times, p. 36, March 18, 1953.)

rected and against which Petitioner's conduct and beliefs must be measured. But it was in the 1950's that the testimony in this case was given by the witnesses and evaluated by the Court, when the political climate had changed full-tilt against the Communist Party, its members or former members, its ideas, utterances and activities.

It is therefore relevant to this Court's "task of examining the foundation for findings in a particular case" (*Baumgartner, supra*, at p. 670) to assess the temper of this earlier period so that political judgments which had been arrived at only by the 1950's should not be retroactively applied to the 1930's when different views were prevalent.

The 1930's was a period of ferment, unrest, change—of seeking for panaceas for our economic and social problems. New needs created new, untried methods and organizations to support them. Unions were forming and growing, political organizations were also being formed or changed, were expanding or fading away as people sought solutions.[33]

It was a period of free, open, vital, radical discussion. Ideas were freely advanced, vigorously defended and violently attacked. Militant, radical, even revolutionary words and phrases became part of the current lingo. Fascism had gained power in Italy and Germany. Communism had won power in the Soviet Union. The bitter struggles, which had spilled over into this country, produced popular names to describe the contesting forces. "Fascist" and "Communist" became part of the vernacular. People and their ideas were labelled "Communist" depending less on semantic accuracy than on political expedient.

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[33] The principal facts, with supporting references justifying the statement in this and the following two paragraphs are compiled in Appendix "E," pp. 148-166.

In the 1930's the Communist Party was considered a legitimate political party, making a special appeal to the working people and the foreign born, whose interests it professed to champion. It participated in elections, in campaigns, in debates; its membership rapidly expanded. Members joined and left its ranks for many reasons, most of them unconnected with the philosophical problem as to the means by which society might change from capitalism to socialism. It published a newspaper, magazines and books; it sponsored lectures, conducted schools and held political conventions. It projected the concept of "a popular front" against fascism and worked with numerous non-communist organizations toward this objective.[4]

By the 1950's the climate had completely changed and, with it, public and governmental attitudes toward these ideas and organizations. The "cold war" had hardened and embittered international relationships. The Soviet Union was regarded as an immediate military threat and Communists were widely regarded as domestic agents of a foreign enemy. Instead of a free flow of political, social and economic ideas into the public market place, fear—imagined

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[4] In *Schware v. Board of Bar Examiners*, 77 S. Ct. 752 at p. 759, this Court in determining that Schware's membership in the Communist Party in the 1930's did not raise a substantial doubt as to his moral fitness to practice law, described the Party and the reasons for persons joining as follows:

> . . . "During the depression when millions were unemployed and our economic system was paralyzed many turned to the Communist Party out of desperation or hope. It proposed a radical solution to the grave economic crisis. Later the rise of fascism as a menace to democracy spurred others who feared this form of tyranny to align with the Communist Party. After 1935, that Party advocated a 'Popular Front' of 'all democratic parties against fascism.' Its platform and slogans stressed full employment, racial equality and various other political and economic changes."

In footnote 16 the Court pointed out that it was estimated that over 700,000 persons had been members of the Communist Party at one time or another between 1919 and 1951.

or real—had brought conformity into every facet of American life.[35]

The Communist Party was under attack by legal and extra-legal sanctions; it was declared a criminal conspiracy by legislation and by Court decision. Its officers were jailed and its members suffered economic and social outlawry. The taint of communism was widened to include anyone in any way connected with the Communist Party or its members and even those who simply refused to openly condemn them.

The investigating committees, the loyalty and security programs, the Department of Justice, grand juries, administrative agencies, local boards and commissions, private organizations, industries and even unions moved to impose sanctions on the Communist Party, its members and supporters through loss of jobs, social degradation, blacklisting and jail.

Despite this vast change in political climate between the period toward which the testimony was directed and the period in which the witnesses testified, the Trial Court's opinion shows no awareness of the potential effect of this environmental factor upon the witnesses' motives for slanting their testimony in favor of the Government. Yet these witnesses demonstrated throughout this record, as we shall point out later, their supine readiness to attribute to petitioner the specific words and meanings suggested to them, which were then used by the Government and accepted by the Trial Court as the basis for its decision.

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[35] The references supporting the statements in this and the following two paragraphs are compiled in Appendix "F," p. 166.

3. *The effect of the Government's dismissal of the earlier criminal proceedings.*

And, quite apart from the question of the witnesses' sincerity, the Trial Court either overlooked or ignored another factor which conditioned the testimony of every witness and reduced it to a level considerably lower than the "clear, convincing and unequivocal" standard. This vital factor was the length of time which elapsed—and which the Government permitted to elapse—between Petitioner's naturalization and the institution of the denaturalization proceeding.

Even if the witnesses had no motive for slanting their testimony against Petitioner (and in all instances, conscious or subconscious motives existed, as we shall show), the Government asks the Court to set aside a judgment of naturalization on the basis of reconstructed memories, sixteen to twenty-nine years' stale, as to words and meanings in conversations and speeches—matters most elusive to memory retention and subject to the widest variation of interpretation.

The unfairness of this long delay in bringing these proceedings is underscored in this case by the fact that Petitioner was indicted by the Government four years after his citizenship had been granted, on the same ground of false swearing concerning Communist Party membership. Thus, the Government cannot assert it was unaware of the allegations underlying its present denaturalization proceeding. The essential facts were presented by several of its key witnesses to the Grand Jury in 1942. If it had proceeded to trial in 1942 in the criminal case and had prevailed, Petitioner's citizenship would have been subject to revocation without a further trial of the issues. 54 Stat. 1159; 8 U.S.C. 738.

But the Government did not proceed. It voluntarily dismissed the criminal indictment, then waited ten years before proceeding to revoke Petitioner's citizenship—waited until the political atmosphere of 1942 had become hostile to his alleged earlier Communist associations and ideas—until the witnesses would be most susceptible to direct and indirect social and political pressures, when their recollections would tend to conform to the Government's theories and their own current fears or prejudices.

The longer the period which elapses between the grant of citizenship and the testimony of the witnesses concerning their recollection of the political beliefs and associations of the citizen, the greater the opportunity for distortion and accretion, to the prejudice of the citizen; and correspondingly, the more difficult becomes the task of the citizen in obtaining and presenting evidence to answer the attack against him.

It would be manifestly more difficult, if not impossible, to locate and to obtain the testimony of witnesses who were present on the innumerable occasions when Petitioner spoke on political or union matters during the years 1925-1938, the period covered by the Government's witnesses. Even if such persons could be found and were willing to testify, and the precise meeting or conversation could be pinpointed, what credence could be given to a witness who would claim to remember that Petitioner had not used the single specific word or phrase, or that this language had conveyed an innocent rather than the reprehensible idea attributed to him by a Government witness?

The burden which the Government, by its delay, thus places upon a citizen in defending his "priceless heritage" of citizenship is so great that when, as here, it is caused by the Government's action in withholding proceedings, serious constitutional issues of due process are raised.

The foregoing three factors serve to highlight the potential injustice inherent in a procedure whereby a naturalized citizen can be stripped of his citizenship, years after the grant, because of his alleged political views and associations at that time, and where "the Government seeks to turn the clock back years after full citizenship was conferred upon Petitioner by a judicial decree, and to deprive him of the priceless benefits that derived from that status" (*Schneiderman*, at p. 122). The potential injustice is even greater when, as here, seventeen years have elapsed between the decree of naturalization and the order of cancellation, a period during which the naturalization laws were twice amended to reflect an increasing public hostility toward the political philosophy encompassed in the ideas of communism, a philosophy attributed to the Petitioner at the time of his citizenship.

The judicial barrier erected by this Court to avoid such an injustice is the high standard of proof, a burden placed upon the Government which has been described as "substantially identical with that required in criminal cases—proof beyond a reasonable doubt".[36] It was the failure of the Trial Court to apply this standard which is the error that lies at the root of its decision here and requires its reversal.

B. The Evidence as to Membership

Viewed from the standpoint of the essential elements necessary to sustain the judgment of denaturalization, our discussion of the factual findings are in three parts: (1) the finding of undisclosed membership in the Communist Party; (2) the finding of proscribed advocacy by the Party;

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[36] *Klapprott* v. *U. S. supra*, concurring opinion at p. 612; this analogy to the rule in criminal cases was assumed but not decided in *Yates* v. *U. S.*, 77 S. Ct. 1064, at p. 1086.

and (3) the finding that Petitioner knew of such proscribed advocacy.[37]

In the Trial Court and in our brief in the Court of Appeals, we elected not to argue the sufficiency of the evidence relating to membership. Petitioner, however, has made it clear both in his Answer and in all of the arguments in this cause that he denies the allegation of Party membership.

Petitioner did not testify. There was no necessity for him to testify or to present witnesses because (a) the Affidavit of Good Cause filed with the Complaint was legally insufficient to confer jurisdiction upon the Trial Court; and (b) the evidence presented by the Government failed to prove a *prima facie* case.

The validity of the Trial Court's finding of membership depends upon acceptance of the testimony of Nowell and Eager which, as we show later (*infra*, p. 94) is inadmissible under *United States* v. *Jencks, supra*, because not subjected to proper cross examination. What remains is the conclusion of the other witnesses that out of the myriad of meetings, caucuses and conferences they attended sixteen to twenty-nine years earlier, they are able now to recall everyone who was present and vouch for the Party membership of everyone who was present. Only acceptance of this highly-dubious assumption permits an initial inference that the particular meeting was a "closed meeting" of the Communist Party and that what transpired was

[37] Under the theory of the Complaint the same three (3) elements were required to establish the charge of "fraud"; and, in addition, it was required also that the Government show that it was in fact misled by Petitioner's alleged concealment. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 43 S. Ct. 458, 464. The Government recognized the necessity of this additional showing and made the allegation in its Complaint (App., pp. 119-120). However, the Trial Court made no such finding.

Party activity. And it is this assumption and this inference which underlie the finding that, because Petitioner was allegedly present at such "closed meetings" he had to be a Party member.[38]

The position of Petitioner and his counsel throughout these proceedings has been and is that, regardless of the Trial Court's finding on the question of membership, the evidence here is insufficient to support the holding that the Communist Party advocated the violent overthrow of our Government at the time of Petitioner's alleged membership; and, if such evidence is found to be sufficient, then certainly there is no evidence to support the finding that Petitioner knew of and approved such advocacy.

Accordingly, we argue here only the two issues of organizational advocacy and Petitioner's knowledge.

C. The Evidence as to Advocacy by the Communist Party

In concluding that the Communist Party taught and advocated the violent overthrow of the Government in the pre-1938 period, both of the Courts below refer to, and appear to rely in large part upon, Court records of other periods and the conclusions reached by other Courts upon those records (App. pp. 141, 146).[39] This Court has recently admonished, with particular reference to the question of

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[38] In the view of the prosecution witnesses every meeting of two or more persons identified as "Communists" was a "closed meeting" of the Party and what transpired was Party activity, whether or not there was any Party authorization for the meeting. Nowell regarded three (3) persons as a "meeting" (Tr. 477); Hewitt, four (4) persons (Tr. 569); Budenz, six to eight (6-8) (Tr. 967); and Eager, ten (10) or twelve (12) (Tr. 374).

[39] See *Schneiderman*, pp. 147, 148, footnotes 29 and 30, where this Court comments upon the conflict which existed among the lower Federal Courts in the 1930's concerning the teaching and advocacy of the Communist Party.

Communist Party advocacy and a member's knowledge of such advocacy, that "it is upon the evidence in the record [before the Court] that the Petitioners must be judged in this case." *Yates* v. *United States*, *supra* at p. 1082.

And even more recently this Court has alluded to the injustice inherent in judging "past beliefs, expressions and associations—by current standards rather than those contemporary with the matters exposed." *Watkins* v. *United States*, 77 S.Ct. 1173, 1184; and see also *Schware* v. *New Mexico*, 77 S.Ct. 752; and *Konigsberg* v. *California*, 77 S.Ct. 722.

The Trial Court's finding as to the teaching and advocacy of the Communist Party is dependent upon the testimony of two former members of the Party, Nowell and Baxter. Both of these witnesses were paid Government informers who had become disillusioned with the organization after being actively in its employ for many years. Both had written contracts with the Immigration Service calling for a minimum employment of eighteen (18) days per month at a salary of $25.00 per day and with the title of "Consultant" to the Service.[40] It was their job to identify for the Service (and other Government agencies) persons whom they had known or had reason to believe were or had been Communist Party members, and to testify at deportation hearings, denaturalization proceedings and Congressional Committee hearings concerning such membership and also as "experts" on the Communist Party. They had no assured tenure, no Civil Service status, and were dischargeable at will. Their continued employment was, of course, dependent upon their usefulness; and this, in turn, was dependent upon the extent of their recollection.

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[40] The witness Reno once had a similar contractual arrangement. (Tr. 1097.)

Nowell testified that he had been a member of the Party in Detroit from 1929 to 1936. Baxter was a member until 1945, but there is no indication that he was ever in Michigan and, admittedly, he had never met the Petitioner.

Both witnesses testified that they had been students at the Lenin Institute in Moscow; Nowell in 1931-32 and Baxter in 1929-30 (Tr. 412, 717).[1] Over objections of Petitioner's counsel they were permitted to give extended accounts of what they were taught at that school by officers of the Red Army and other international Communists. Aside from the remoteness of this testimony in both time and relevancy, and the absolute inability of Petitioner to test its veracity by independent investigation in any manner or to call witnesses in refutation, the accounts were inflammatory and highly prejudicial (Tr. 408, 409, 731-733). No person—judge or jury—in the United States in 1954, could escape being adversely affected, consciously or subconsciously, by such an account. (See Appendix "F" to this Brief for indication of the political climate, p. 166.)

But the basic criticism of this testimony is the fact that the Trial Court permitted these conclusory accounts of Nowell and Baxter with respect to the Russian Communist Party, to be attributed to the Communist Party of the United States, and by inference to this Petitioner, relying upon the most tenuous connection between the two organizations and no connection whatever between the Petitioner and what allegedly was taught at the Lenin School. As to Nowell's testimony, the connection with the American Communist Party, presumably was based upon his statement that he was sent to the Lenin School with the blessing of Earl Browder, then National Secretary of the American Communist Party (Tr. 410); and the witness' own further

[1] "Tr. —" refers to the typewritten transcript of the evidence filed in this Court.

statement (Tr. 413) that "In the (Party) School in 1930 in Detroit, we were taught essentially the same subjects, the same strategy and program, techniques, policies as were taught in the International Lenin School."

The connection with respect to Baxter's account, was even more vague. It, presumably, was based upon his statement that his attendance at the Lenin School was "approved, by . . . the Communist Party of the United States" (Tr. 723); and that when he returned from the Lenin School he taught Communist Party classes in California and Ohio (Tr. 745). He did not even claim that he taught "the same" things he was taught in Moscow.

Since each of these witnesses' period of claimed attendance at the Lenin School preceded any claimed connection between the Petitioner and the Communist Party, and since each of them claimed extensive Party activity as teachers and lecturers on Party doctrine at Party schools in the United States during all or part of the years immediately prior to Petitioner's naturalization in 1938, there was here no justification whatever for allowing these lurid accounts concerning their training in Russia as "professional revolutionaries" (Tr. 410); accounts replete with references to "barricade fighting, target practice, grenade practice, gas mask drill, sabotage, code dismantling and reassembling of . . . arms" (Tr. 711) and "the making of bombs" . . . and "The type of fuses to use" (Tr. 731). At a minimum these witnesses should have been compelled to confine themselves to stating what they had been taught or had themselves taught at schools conducted by the Communist Party of the United States during the period when it is claimed Petitioner was a member of that Party; and this should have been given, not in terms of conclusionary ref-

erences (i.e., "essentially the same subjects" (Tr. 413)), but rather in terms of who said what, when and where.[42]

The admission in evidence of these Lenin School accounts, followed by Nowell's conclusion that the American Communist Party taught "essentially the same", was prejudicial error. Nor was this error cured by the simple expedient of calling it the opinion of "experts" (Tr. 422). While the introduction of opinion testimony is discretionary with the Trial Court, the rule is clear that where relevant facts giving rise to the conclusions can be presented by the witness, it is error to allow the witness' conclusion. 2 *Wharton, Criminal Evidence* (11th Ed.) 1658; *United States* v. *Cotter*, 60 F.2d 689, 694 (C.A. 2). And it is one of the cardinal rules of evidence founded upon a litigant's right to have the essential facts in his case decided by the duly authorized trier of the facts, that the opinion testimony of a witness, whether lay or expert, is inadmissible upon an ultimate or vital fact in issue. *United States* v. *Spaulding*, 293 U.S. 498, 506; *Altmayer* v. *Travelers*, 119 F.2d 1005; *The Domira*, 49 F.2d 324, 328; 2 *Wharton Criminal Evidence*, secs. 1682-1685.

But even if the Lenin School testimony and all of the other testimony of Nowell and Baxter concerning the Party's alleged advocacy is accepted at face value, the total is insufficient to bring the Party's advocacy within the area which may be constitutionally proscribed.

Nowell's remaining testimony as respects the Party is fairly indicated by the following excerpts:

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[42] In *Yates* this Court, in discounting similar accounts of alleged advocacy unconnected with defendants, said "Most of these were not connected with any of Petitioners, or occurred many years before the period covered by the indictment. We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as the nexus between these petitioners and the conspiracy charged . . . ." (At p. 1082.)

"Its ultimate objectives, I was taught were to overthrow the government of the United States and establish the . . . and the economic system, and establish the dictatorship of the proletariat fashioned after the Soviet system in Russia (Tr. 411).

* * * * * * * *

In fact they were the objectives. That Russia, Soviet Russia was the spearhead of the international revolution; that it was the Fatherland of the working class; that it was the leader of the Communist International in all of its Sections and that the Communist Party of the United States was a Section of the Communist International and was bound by its decisions. That the directives given by the Communist International were the surest guide to the revolution in the United States (Tr. 411).

* * * * * * * *

I repeat, your Honor, I said it is not a matter of my opinion. It was taught very specifically along with about fifteen hundred students from twenty six countries, the aims and purposes of the Communist International, the role of the Soviet Union, the role of International class war, the aims and purposes of the Communist Party of the United States, and those are as I have stated here on about three occasions, and I recently outlined as to what I was taught in my studies in the Lenin School and in the School in Detroit in 1930.

* * * * * * *

The aims and purposes of the Communist Party of the United States, during the period of my membership was to organize various segments of the population, especially industrial labor, to ele-

vate their political thinking along Communist lines—

(Continuing) —to direct them in accordance with the Communist policy and organizational strategy towards, and directly to, overthrowing the Government of the United States, the establishment of the dictatorship—the establishing of the dictatorship of the proletariat in accordance with the Soviet form of government. That is my opinion gotten from my own experience and studies (Tr. 1213).

Q. (By Mr. Hamborsky). Do you have an opinion on how the Communist Party believed as to the desirability of obtaining these aims and objectives?

A. I do.

* * * * * * *

A. The mode, the method, the desirability and stated aim and purpose of the Communist Party during the period of my membership was the violent destruction of the Government of the United States, and the dismemberment of it, and setting up the dictatorship of the proletariat in accordance with the new form, that is, the Soviet form of government. Not only was it the opinion of the Communist Party that the Government of the United States must be destroyed violently, but they held that that was the only way that it could be destroyed and rejected any other conception of change of form of government in this country and the economic system.

Q. (By Mr. Hamborsky) Now, the aims and objectives as you have just testified to, were they the same during the entire period of your membership in the Communist Party?

A. They were" (Tr. 1217).

* * * * * * *

Similarly, the testimony of Baxter concerning the Party (aside from his account of the Lenin School), is fairly shown in the following excerpts:

> "I taught very simply that the obtaining of Communism could not be done without the overthrow of the system of capitalism and its political representatives, the capitalist state, which in that case was the United States government (Tr. 748).
>
> * * * * * * * *
>
> The ultimate objectives of the Communist Party is the establishment of a Soviet system, a system of Communism, following a successful overthrow of the present United States government.
>
> Q. And do you have an opinion, Mr. Baxter, on how this was to be accomplished?
> A. Through the method of armed insurrection" (Tr. 762).

Upon objection by defense counsel, the above question and answer were stricken, the Trial Court stating:

> "Anybody, as a right to state; as I understand it, that the only way you can get Communism here is by the overthrow of this government by force and violence. You do not violate any law when you say that" (Tr. 764).

On cross-examination Baxter affirmed the following testimony previously given by him at a deportation hearing:

> "Q. What was the belief of the Communists with respect to what would happen if the working class obtained a majority of legislature or parliament, whatever it might be, and sought to effect a parliamentary change in the whole social and economic system? (Tr. 790)

A. The belief of the Communists is that before that would be accomplished, Fascism would step in.

Q. Would you still say that that would be a correct answer to that question? (Tr. 791)

A. Yes, that is the belief of the Communists, before that could be accomplished.

Q. Why?

A. (Reading) Because the ruling class would never give up its power peacefully and that therefore, in developing the slowing and of the major fight against Fascism, the Comintern did not distinguish between capitalism or Fascism. Fascism is described by the Comintern as the most violent section of the bourgeoisie, who seeks to maintain power by open force and by abrogation of Democratic rights?

A. That's correct" (Tr. 791-792).

But on re-direct the Government again inquired of the witness the "aims and objectives" of the Party and the witness replied as follows (Tr. 817-823):

"Q. (By Mr. Hamborsky, continuing:) What was the belief as to how the aims and objectives were put into effect?

A. Only by the forceful overthrow of the United States government by the working class, under the leadership of the Communist Party, by forceful and violent overthrow, I mean, the road of insurrection, the armed revolt (Tr. 817).

Q. (By Mr. Hamborsky, continuing:) Would you explain what you meant by that answer, witness?

A. Only by force and violence on the part of the working class through all instruments of arms, can the present government of the United States be overthrown, or the Government of the United States in existence at that time in the period mentioned, be overthrown and replaced by a new government that would represent the working class and the Soviet System (Tr. 818).

* * * * * * *

Q. (By Mr. Hamborsky, continuing:) You have testified that the aims and objectives as to the Communist Party could only be put into effect by force and violence, and you testified further that that was the belief of the Communist Party. Now, what do you mean by that? (Tr. 822-823)

* * * * * * *

A. Well, the force and violence is meaningless unless it is the force of arms. In other words, to overthrow the Government of the United States by means of arming the working class and leading them to insurrection, to overthrow the Government by means of arresting of public officials, the establishment of a new government that would replace the present Government of the United States. That is the only way that it could be put into effect. That is the only way that the Communist Party believe that they could come to power within the United States and rejected the theory within its ranks, although it ran on tickets and ran for offices and ran in so-called elections that they would ever be allowed by the capitalist class to receive a majority of votes, or to remain on the tickets if they became too powerful" (Tr. 823).

In appraising the sufficiency of this testimony to justify the Trial Court's finding of proscribed advocacy by the Party, we need go no further than refer to this Court's recent opinion in *Yates* v. *United States*, *supra*. For the same kind of evidence, as summarized above, was before this Court in *Yates*. Involved there, also was a proscription of advocacy identical with the Government's contention, here.

In *Yates* this Court restated the kind of advocacy which is outlawed by a ban such as that sought to be imposed by the Government here. It said that such advocacy and teaching must be shown to be "the advocacy and teaching of concrete action for the overthrow of government, and not of principles divorced from action."

> "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something" (*Yates*, at p. 1080).

Referring to the nature of the evidence in *Yates*, this Court continued:

> "Instances of speech that could be considered to amount to 'advocacy of action' are so few and far between as to be almost completely overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value . . . " (*Yates* at p. 1081).

This Court then summarized its holdings as to the Communist Party's advocacy as follows:

> "But when it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time, we cannot but regard this record as strikingly

deficient. At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy" (*Yates* at p. 1082).

It is submitted that a review of all the evidence in this record concerning the Party's advocacy—or its "aims and objectives"—shows that there is nothing here, either in terms of what was allegedly said or the time, place and circumstances in which it was said, that was not before this Court in *Yates* and considered by the Court with particular reference to those defendants whose acquittal was ordered in *Yates*.

Nor can the testimony of the witness Zygmont, though ignored by the Trial Court as evidence in support of the Government's contentions, be ignored where it directly contradicts the Government's theory on this aspect of its case.

It appeared that this witness had held important offices in the Communist Party of New York from 1932 to 1937, that he was secretary of the Communist Front, the Chamber of Labor, a member of the Polish Faction Bureau, a secretary of his club and an organizer (Tr. 881). In 1937 he left the Communist Party and joined a "Trotskyite" organization which was an opposition organization to the Communist Party (Tr. 883). He left the Communist Party in 1937, as he testified, because he thought it was a "phony revolutionary" party (Tr. 885).

In 1938, he wrote a pamphlet concerning his own experiences in the Communist Party in which he condemned the program and aims and objectives of the Communist Party and urged the members of that organization to join the "Trotskyite" party as being a true revolutionary and not the "phony revolutionaries" of the Communist Party. He asserted that "the Communist Party desires to maintain it (American capitalism) and stabilize it" (Tr. 898). He then

presented to the readers, by way of contrast, the following as the position of the Trotskyite party:

> "In order to abolish capitalism and introduce the Socialist order of society, the working class must aim to take into its own hands the State power. Securing the State power by the Proletariat cannot follow the path of taking over the bourgeoisie State machinery through the medium of attaining a majority of the Parliament. The bourgeoisie will always utilize all manner of force and terror to defend and protect its property and its political supremacy. The Capitalists, like the feudal nobility, will not surrender to the new, rising class without bitter struggle.
>
> "Therefore, the force of the bourgeoisie can only be broken by the working class by immediate removal of the existing State apparatus. That is, the Capitalist Army, Police, Bureaucratic Hierarchy, Parliament, and replace such by the organization of the Proletariat State" (Tr. 935).

This description of the "Trotskyite" party is precisely the one which the Government now seeks to attribute to the Communist Party in *1938*. But in *1938* it was the description of an organization which the Government's witness then considered as exactly the opposite of the Communist Party in its aims and objectives.[43]

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[43] The witness sought to squirm out of the difficult position which he had unexpectedly found himself and in which he had placed the Government, by suggesting that in writing the pamphlet he was trying to receive the people as to the true nature of the Communist Party in order to wean away members of that organization to the true revolutionary party.

A more patently false explanation could not have been devised. For even if the witness' explanation is to be credited, it would simply mean that in 1938 he *believed* that he could convince members of the Communist Party that they should leave that organiza-

This witness' contemporary evaluation of the objectives of the Communist Party during the crucial period up to 1938 is completely inconsistent with the Government's position in this case and the testimony of its other witnesses who testified that the objective of the Communist Party in 1938 was to violently overthrow the United States Government.

This conflict in the evidence, with respect to this crucial issue in the Government's case, does not begin to meet the *Schneiderman* standard. If a man like Zygmont, who was so active and held such important posts in the Communist Party up to 1938, could then conclude that the Communist Party advocated cooperation with capital and peaceful means of transition as opposed to violent overthrow of the government, how can a finding of denaturalization in this case based on a contrary conclusion be said to be predicated on clear, convincing and unequivocal evidence?[43a]

Further, there is no testimony here concerning the Party that was not before this Court in *Schneiderman* and which was not encompassed in the holding there that it is

> "a tenable conclusion—that the party—desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances

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tion and join the "Trotskyite" party by calling to their attention that their organization was *not* revolutionary but one which believed in cooperation with capitalists, while the "Trotskyite" organization believed in real revolution.

[43a] A similar question arises with respect to the Government's position in the 1942 indictment where it was charged that Petitioner was a member of the Communist Party which in 1938 was an organization "teaching disbelief in organized government" (App., p. 115).

constitutional or peaceful channels were no longer open."

At most, all that the testimony here can be said to show is that the Communist Party in the pre-1948 period urged its hearers to *believe* that the Government of the United States was a capitalist government whose violent overthrow would be necessary before a government of workers could be brought into existence. This is advocacy of "abstract ideas"; there is here no urging to *do* anything. Hence, both *Yates* and *Schneiderman* require a reversal of the Trial Court's finding concerning the character of the Party's teaching.

D. The Evidence as to Petitioner's Knowledge

It is not necessary, however, to dwell upon the insufficiency of the evidence as to the teaching and advocacy of the Party; for, in any event, there is here an absence of any showing that this Petitioner knew or had reason to know the Party as an organization which advocated the violent overthrow of the Government.

It is extremely difficult, if not impossible, to ascertain from the Trial Court's generalized findings the bases upon which it predicated its conclusion that Petitioner knew the Communist Party as an organization advocating the violent overthrow of the government. The opinion observes:

It is noted that this is the same appraisal of the Party's advocacy given by the witness, Baxter, on his cross examination, (Tr. 792-802).

Compare the observations recently made by this Court in *Schware* v. *New Mexico*, *supra*, to the effect that in the period 1932-1940 the Party "was a lawful political party with candidates on the ballot in most states; and that the Party attracted many people by its radical solution to the grave economic crisis," its opposition to fascism and its program for full employment and racial equality. And see *Konigsberg* v. *California*, *supra*, to the effect, since the Party was recognized in most States, "Those who accepted the State at its word and joined that Party had a right to expect that the State would not penalize them, directly or indirectly, for doing so thereafter."

"We agree that mere membership in an organization does not prove knowledge of its aims and objectives and that utterances of its more vocal members cannot be imputed to Nowak to show that he accepted or believed in the principles of the organization. See United States v. Hauck, 155 F. 2d 141. But here we are not concerned with belief or acceptance. It is sufficient if it is shown that defendant knew what the aims and objectives of the Communist Party were at the time he was a member and naturalized, and it is well recognized that external circumstances, such as communication of facts, is available to show that consciousness or knowledge ensued as a result thereof" (App. p. 139).

But what is meant by "external circumstances" and "communication of facts" is not readily apparent. We discern in the Trial Court's opinion two possible reasons for its finding as to Petitioner's knowledge: (1) Claimed secrecy of membership and (2) Certain alleged activities or statements attributed to Petitioner.

1. *Claimed Secrecy of Membership.*

The Trial Court stated:

"... His (Petitioner's) membership in fact was so sacrosanct as to be kept secret from other members although he was known to have given lectures in the communist school, attended closed meetings (including enlarged national committee meetings where only the most trusted leaders were in attendance) and that he was well known in the communist center of New York"[46] (App. p. 140).

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[46] Even if the record here established the correctness of each of these assertions, this would be insufficient to support a finding of personal knowledge of illegal advocacy in the absence of proof that illegal advocacy was engaged in by Petitioner or by those present at such classes and meetings. See *Wieman* v. *Updegraff*, 344 U. S. 183; cf. *Yates* v. *U. S.*, *supra*; *Schware* v. *New Mexico*, *supra*; *Konigsberg* v. *California*, *supra*.

In concluding that Petitioner was a "secret" member of the Party, the Trial Court evidently had in mind the testimony of the witnesses, Nowell, Hewitt and Budenz to the effect that they were told this by third persons. An examination of this hearsay shows its incredibility. Moreover, the contention of "secrecy" is negated, if the testimony of other prosecution witnesses is to be believed.

The witness Nowell testified that he was told by the State Chairman of the Party (Weinstone) on two occasions that Petitioner's membership was not to be generally known. The first time was at the above mentioned 1935 meeting when Petitioner allegedly was initiated and introduced by the chairman to approximately 25 "top functionaries" of the Party (Tr. 479-486). The second time was while Nowell and Weinstone were riding on a "street car going some place" which "ran up and down Fourteenth Street" (Tr. 482). Evidently realizing, belatedly, that a "secret" openly communicated to twenty-five persons at the same time, is hardly a secret any longer, Nowell found it expedient to retract his testimony about the first occasion and to rely entirely upon the "street car" incident (Tr. 489-492, 496-498).

The witness Budenz recollected that in 1938-1939 he attended a meeting of 6 to 8 people at which Petitioner was present (Tr. 967-969). The meeting was called to discuss "infiltration into the United Automobile Workers". The meeting was "blurred in my mind" but he recalls that Weinstone told the group that Nowak "should leave before the rest of us" (Tr. 969). In the light of this, Budenz's subsequent testimony that during this same period he also saw Petitioner in attendance with approximately 200 other people from all over the country at enlarged meetings of the Party's National Committee in New York (Tr. 998-

1000), we hardly can credit his inference that Petitioner was a "secret member" of the Party.

The witness, Hewitt, gave an elaborate account of his first of two meetings with Petitioner fourteen years before—in 1938-1939. His account was calculated to show secrecy (Tr. 562-570). He stated that in the Fall of 1938, when he was engaged as a faculty member at Michigan State College in Lansing, he was told by an unidentified person that "Stanley Nowak was, because of his position in the Michigan Legislature, a secret Communist" (Tr. 570-575). Aside from the fact that this is the sheerest hearsay, Hewitt's own conduct in the fact of this advice belies his entire testimony. For according to his account, Petitioner's membership, while secret in Detroit in 1938, was sufficiently well known in Chicago (where Petitioner had not lived since 1932) that Hewitt, on leaving Chicago and coming to Michigan, was instructed (again by an unidentified person described as an "officer" of the Party) to contact Petitioner for the purpose of becoming "re-connected" with the Party (Tr. 561-563).

Hewitt further stated that he was taken to Petitioner's home by a person or persons whose name or address he does not recall and whose sex he does not remember (Tr. 564, 592-596); and that in the presence of this person he paid his Party dues to Petitioner (Tr. 567, 610-611). At the same time, he was told by this unidentified person that Petitioner was a member of the Legislature and, hence, should not be contacted in Lansing. Notwithstanding this injunction, a few months later—Spring of 1939—and while Petitioner was a member of the Michigan Senate, Petitioner is supposed to have accepted an invitation from the witness to attend a "unit" meeting of the Party in Lansing, arranged and presided over by this witness (Tr. 611). This "unit" meeting was held at the home of an unidentified

fellow professor and his wife who were non-members of the Party. Following a speech by Petitioner, the professor and his wife immediately joined the Party and they, together with the witness and Petitioner, made up the entire "unit" (Tr. 611-618). The witness then collected dues (Tr. 571-2, 628) from Petitioner in the presence of these two initiates—and all of this, notwithstanding the witness said he had been instructed that Petitioner's membership was secret!

Aside from the incongruity of these accounts of secrecy by Nowell, Budenz and Hewitt, the testimony of several of the other witnesses belies this claim of secrecy. For according to the testimony of all of the other prosecution witnesses, Petitioner was seen and spoke at numerous "closed meetings" of the Communist Party without any suggestion by anyone that his alleged membership was "secret" (Tr. 198-210, 278, 311, 648-651, 655, 659, 660, 706, 1144); indeed, he was supposed to have been introduced to a class of new recruits "as an expert on the activities of Communists in the labor movement" (Tr. 654), and on another occasion, he was severely criticized by the Party Chairman for not recruiting new Party members (Tr. 204). Finally, the witness Fountain—whose testimony showed far more association with Petitioner than that of any other witness—stated emphatically (Tr. 682) that no one ever advised him that Petitioner's alleged membership was to be concealed; and further, that he knew of no such thing as the membership of one Communist being concealed from other Party members (Tr. 682-684).

2. *Alleged Activities and Statements of Petitioner.*

The Trial Court's finding asserts that Petitioner gave "lectures in the communist school" and attended "enlarged national committee meetings where only the most trusted

leaders were in attendance". Only one witness, Fountain, testified concerning a "class" or "school" at which Petitioner was alleged to have spoken. This was described as a "class for new recruits", held "in the summer of 1937". Petitioner, allegedly, was introduced as "an expert on the activities of Communists in the labor movement", and gave a single "lecture" on the United Front policy,[47] in which he urged his hearers to recruit "more members for the Union, to recruit more members for the Party, and to build the two organizations at one and the same time" (Tr. 651-654).

Obviously, crediting this statement to Petitioner does not show personal knowledge on his part that the Party advocated the violent overthrow of the Government. Counsel for the Government appears to have been aware of this deficiency. He inquired and witness accommodated with the following added recollections.

> "Well, just to go into more detail on what was said in that Class in which Mr. Nowak was one of the lecturers, the goal of all this activity was to extend the Soviet system around the face of the earth, and it was said that the primary work was to get to them through working people, through labor. Through working class organizations and unions, and that the duty of the Communist Party was to get its members inside these unions wherever that was possible, and to attempt to control them and to direct them, and to win their loyalty over to the Russian system" (Tr. 664).

But even this mention of the "Soviet system" was deemed insufficient by Government counsel. The witness was

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[47] The witness described this as a policy whereby "communists were to seek alliances with Democrats, Liberals, labor people, church people, all types of people outside of the Communist Party and attempt to work with them and unite with them against Fascism." (Tr. 652.)

pressed for a further recollection of this 1937 speech, and replied

> "The only way that I can answer this is to say that in substance in the course of this lecture, he said that when you are a Communist, you try to win control of your union for the Communist Party; you agitate on elections; you work by trying to win elections and get people elected to office, Communists and otherwise, and that this is to be carried on year in and year out seeking control for the Communist Party. You can't get it that way, but it may be necessary to use violence to get it, to win control for the Communist Party and the Communist system. That was his goal" (Tr. 665).

The Trial Court stressed that portion of Fountain's testimony which credits Petitioner with this statement: "the goal of all this activity was to extend the Soviet system around the face of the earth."[48]

Where, however, is there anything in this statement which even remotely suggests advocacy of violent overthrow of the government as a principle of action, or knowledge by petitioner of such advocacy? The witness' final belated recollection that Petitioner said "it may be necessary to use violence", does not supply this deficiency. And this is so whether the statement be interpreted as an expression of Petitioner's view or that of the Party.

But, even aside from this fundamental shortcoming, this evidence is subject to all of the infirmities associated with

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[48] Attention is called to the word for word similarity between this statement attributed to Petitioner and the statement which this same witness says was made in Petitioner's presence by one Gebert (Tr. 649). Note, too, that according to this witness, Petitioner made the same statement to a Party Convention. (Tr. 661, 662.) Such repetition suggests that the witness may have a confused recollection of the three occasions and what was said on each.

a conclusion predicated upon the present recollection by a witness of the contents of an oral statement made seventeen (17) years earlier. The whole tenor of the witness' testimony shows his confusion and the lack of trustworthiness which results. He recalled a speech in the Summer of 1937 to a Party class (Tr. 652). But he confused what allegedly was said at this class with what Petitioner was supposed to have said "in 1937 or 1938" to a Party Convention of 150 to 200 people (Tr. 696). First the witness stated that Petitioner told this Convention in substance what he was supposed to have told the class (Tr. 662). But on the following day of his testimony, the witness did not recall having so testified (Tr. 696-700). Furthermore, he did not recall whether Petitioner spoke to this convention from the floor or from his seat, nor who called upon the Petitioner to speak nor what the Petitioner said to the Convention.

Again at p. 659 of the transcript this witness placed Petitioner at a Party meeting in the Fall of 1937 at which William Z. Foster, National Chairman of the Party, was supposed to have spoken. But thirty-six pages later in his testimony he questioned whether he had ever testified that Petitioner was present at this meeting[49] (Tr. 694-695).

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[49] This appears to be the same meeting recalled by the witnesses, Rataj (Tr. 199-205) and Herbster (Tr. 280-282) at which, according to each, Petitioner was criticized by the Chairman, Weinstone, for not having recruited any members. Aside from the incongruity of expecting recruitment by one whom the Chairman himself (according to Nowell) had said was a "secret member," the account of the meeting given by these witnesses and that given by Fountain have important differences. Both indicate that the Party's National Chairman was present—one says Foster, the other says Browder. But both say that after Petitioner was criticized, he defended himself from the floor; whereas Fountain, after first saying that Petitioner was present at this meeting and urged his hearers to greater activity on behalf of the Party, later on (Tr. 659) in cross examination he repudiated this testimony. (Tr. 695.)

This is hardly the kind of "clear, unequivocal and convincing" proof which *Schneiderman* demands.

Thus, while the Trial Court's findings gives the impression that Petitioner was versed in Communist teaching and advocacy to the point of being a lecturer at a Communist school, the evidence supports, at most, the view that Petitioner spoke once to a single group on the meaning of the "United Front Policy" and suggested that his hearers, Communists and non-Communist Party members in Unions (Tr. 684-692), could "extend the Soviet system (i.e., Socialism) around the face of the earth": by attempting to get themselves elected to union office and controlling and directing the unions. This was to be achieved by elections; "but it may be necessary to use violence to get it." Assuming the truthfulness of this evidence, it must be viewed in the light of Petitioner's labor background and experiences in the bitter labor struggles then prevalent in Detroit between the auto manufacturers and Petitioner's union, UAW—CIO, and the internal factional fights in the union in which all groups were seeking maximum votes—Communist and non-Communist alike—as testified to by this same witness Fountain (Tr. 656, 695-96). When viewed in this light, it is a permissible hypothesis, not excluded by the proofs, that if, indeed, Petitioner spoke as indicated, he was addressing himself to the subject of building the trade union movement in the face of intense employer opposition (UAW CIO) which frequently ripened into picket line violence between workers and the police; and not to the advocacy of any changes in the Government.

The Trial Court also referred to testimony that Petitioner attended enlarged meetings of the Party's National Committee. Here again we have only the testimony of two paid informers, Budenz and Reno (Tr. 983-1046). But even if it be assumed that their testimony is true and unbiased by

their personal interest,[50] there is no indication of what was said at any of these meetings.[51] It is clear that nothing was said by the Petitioner. For all that appears, these meetings were political conferences of two or three hundred people, called by a recognized and legal political party and concerned with legitimate political activity (Tr. 1051) an estimate of prior election campaigns and a projection of the Party's political campaign and activity in the future —all of which is constitutionally protected by the First Amendment. See *Sweezy* v. *New Hampshire, supra.*

We conclude, therefore, that there is nothing in these two references of the Trial Court that supports its conclusion that Petitioner knew the Party as an organization engaged in proscribed teaching and advocacy.

We turn now to an examination of the only other statements attributed to Petitioner which the Trial Court could possibly have had in mind but to which no specific reference is made. This is the testimony of the witnesses, Nowell and Eager. In its examination there is revealed again the technique used by the Government counsel throughout the trial of this case; a technique which included persistent use of leading questions (to the point where even the Trial Court appears to have become exasperated (Tr. 321, 384)); and the repetition of the same inquiry, over and over again, in the expectation that the

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[50] See generally, "The Informer" in April 10, 1954 issue of the *Nation*; "The Strange Case of Louis Budenz," by Joseph Alsop, *Atlantic Monthly*, 1952.

[51] There is no indication that attendance at such "enlarged" meetings was restricted to Party members. Notwithstanding Budenz described these as "closed meetings," it is significant that in his book "Men Without Faces" he studiously refrained from identifying Petitioner as a Party member, though he does claim to have seen Petitioner at Party headquarters in New York (Tr. 984-988).

witness would eventually use the formula—"by force and violence".

Nowell. Nowhere in Nowell's testimony did he actually identify Petitioner with any advocacy of force and violence by the Party. He purported to relate a speech allegedly made by the Petitioner in September 1935, upon his admission into the Party. He testified that Petitioner said (Tr. 456-457):

> "* * * recapitulated his—what he terms or stated was his ideology and political growth and maturity; that he believed in reformism, but more and more he began to realize as time went on and situations changed that the Proletarian Party could not satisfy the needs of the working class nor his own political needs.
>
> "Therefore, still using his—stating what he said, rather, that he eventually came over whole-heartedly and became a member of the Communist Party.
>
> "He went on to make a brief analysis of capitalism and the conditions under which the Communist Party operated, that is, the theories under which it operated, and stated his full agreement with those theories and the leadership of the Communist Party of the United States and the Communist International, its program and final objectives—and I quote as nearly as possible—he stated that the working class could never achieve its objectives or get its rights under capitalism, that it would be necessary to destroy—I am reasonably sure of the word 'destroy'—capitalism and set up a government of the workers.
>
> "So he pledged his allegiance to the leadership, program, policies and promises of the Communist Party of the United States and Communist International at that meeting following his introduction by William Weinstone."

If, indeed, this is a truthful recollection, after twenty (20) years, of something said by one of some twenty five persons present at this meeting,[52] we are still left to surmise what "conditions", "theories", "leadership", "program and objectives" were referred to or intended by Petitioner and how he contemplated capitalism was to be "destroyed". We are asked to assume, further, that Petitioner's use and understanding of these terms coincided with the interpretation which the witness now seeks to attach to them. But while the witness' own interpretation of these terms and of the Party's program and objectives is apparent from his prior "expert" testimony concerning the Party's "aims and objectives" as related above, there is here no showing that Petitioner *knew* of Nowell's interpretation, and, hence, no basis for the above assumption. The Trial Court itself (quoting *Schneiderman*) correctly observed that "utterances of the Party's more vocal members cannot be imputed to Nowak".

But even if it be assumed that the above statement, attributed to this Petitioner, meant what the witness and the Government now seek to have it mean, namely, advocacy of violent overthrow, it still does not amount to advocacy of such overthrow "as a principle of action", within the meaning of *Yates, supra*. To hold otherwise is to ignore this Court's admonition against giving "too great weight" to "vague references" such a "revolutionary" or "militant"

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[52] Nowell was "not sure" if he gave the same account of this alleged speech in his 1939 appearance before the House Un-American Committee; and he did not recall if he related this matter in his testimony about Petitioner which he gave to a 1942 Grand Jury (Tr. 500-505). Additionally, Nowell's emphasis here on his ability to recall the word "destroy" should be compared with his mistaken insistence that he had not used the word "conspiracy" in his testimony, even after he was advised by the Trial Court that he had. (Tr. 1196-8.)

action.[53] It is submitted that the use of the term "destroy" falls under the same condemnation.

Eager. The witness, Eager, was certainly the Government's most appropriate witness on the issue of Petitioner's knowledge immediately prior to and at the time of naturalization. According to his testimony as Chairman of his plant unit and Petitioner as the International Representative for that plant unit would be in continuous contact from about March 1937 until the latter part of 1938 (Tr. 307-310). He claimed that the Petitioner recruited him into the Party; that he and Petitioner belonged and paid dues to the same Party unit at the plant; and that he attended about thirty "closed meetings" of this unit with Petitioner (Tr. 311-314). This unit consisted of "10 or 12" fellow employees.[54]

Eager testified to a specific recollection of three such "closed meetings" at which Petitioner had spoken (Tr. 328). At the first of these meetings held at Magnolia Hall, according to Eager, Petitioner:

> ". . . gave an outline of what Party members should do in the Plant and that we would have to be a little more aggressive if we expected to get anywhere at that time" (Tr. 314),

> ". . . Well, there was quite a bit of talk of political action at that time, at that meeting, and he said we

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[53] "Vague references to revolutionary or militant action of an unspecified character, which are found in the evidence, might in addition be given too great weight by the jury in the absence of more precise instructions." *Yates* v. *United States*, *supra*, at p. 1081.

[54] In addition to the above "unit" meetings, the witness stated that he had had several "personal conversations" with Petitioner, but, "I can't recall of him expressing anything relative to Communism at that time, otherwise than that was the position of the Party and the men in the shop that was all" (Tr. 317).

couldn't depend entirely on ballots in this country; it was only by militant Communist leadership in the shops, stores and factories and mines that we could expect to have a Soviet America" (Tr. 315-316).[55]

Pressed for further recollections of this meeting, the witness added (Tr. 315-316):

"Well, there was quite a bit of talk of political action at that time, at that meeting. And he said we couldn't depend entirely on ballots in this country; it was only by a militant Communist leadership in the shops, stores and factories and mines that we could expect to have a Soviet America.

Q. That we could expect to have a Soviet America. Is that what you said?

A. Yes.

Q. And you heard Mr. Nowak say that on this occasion at Magnolia Hall?

A. Yes, I did.

Q. At any other time, did you hear Mr. Nowak discuss the aims and objectives of the Communist Party?

A. Yes. He used to explain the workings of the Communist Party to myself.

Mr. Goodman: Just a moment. Let's have the time and place, please.

Q. (By Mr. Hamborsky:) Where?

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[55] These quotations reflect a characteristic peculiar to Eager's entire testimony. But for the fact that he obviously is intent upon identifying each occasion as "a closed Communist meeting" and inserting in each recollected statement some reference to the Communist Party, each of the occasions and speeches he recalls is typical of what a union organizer in Detroit in 1938 would be expected to say to the workers in his plant.

A. Well, we used to meet in the organizers' room of the local. It was only just a personal conversation."

Throughout his direct examination Eager repeatedly expressed his own doubts about his power to recall specific occasions and what was said,* and repeatedly the Trial Court found it necessary to admonish Government counsel against attempting to force a non-existent recollection (Tr. 321) or asking "leading and suggestive questions" (Tr. 320). Nevertheless, counsel continued to press for further recollection of "any other occasion" "when Petitioner is supposed to have discussed the Communist Party." The witness answered (Tr. 321):

"A. Well, he said the Party policy was that members of the Party in the various unions should take an aggressive and militant leadership of the union.

Q. Aggressive, militant leadership of the union?

A. Yes."

Counsel then inquired if Petitioner had "discussed the Communist Party with the witness" in private conversations (Tr. 324):

"A. Yes, we did.

Q. And what did he say?

A. About the same as what he said at the meeting in Magnolia Hall, that it was only by an aggressive

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*"I can't recall the exact words he said at that meeting, it is so long ago." (Tr. 322.)

"You can't keep it all in your mind. It is so long ago, I can't remember him passing any remark that would leave any indelible mark on my memory." (Tr. 323.)

"Well, I can't recall these expressions by the various meetings at which—I couldn't pick out any particular one of them and remember today the exact words he said." (Tr. 330.)

"I can't very well remember the substance of it only what was the usual subject at most of those meetings." (Tr. 331.)

"Well, that is about all that I can actually recall that I can testify in Court." (Tr. 331.)

Communist Party leadership in the unions that we could get the mass of workers in back of that leadership, and whenever the revolution would come for a Soviet America that then we would have the people, the workers, at our back.

* * * * * * *

Q. (By Mr. Hamborsky:) Did you ever hear Stanley Nowak advocate such a revolution?

* * * * * * *

A. I can't say if I did." (Emphasis ours.)

The witness was asked to recall "in substance" (Tr. 330) anything Petitioner had said at any other of the three "closed meetings", and he replied:

"A. I can't recall his exact words or expressions by anybody at meetings, it is so long ago, that is, the exact words of what he said—he stated at Magnolia Hall, which was only by a militant leadership of the Party members in the stores, factories and shops that we could ever hope to have a Soviet America. I think that was the general substance of his remarks.

Q. (By Mr. Hamborsky:) And that is all that you can recall he said during the time that you were a member of the Ternstedt Unit with Mr. Nowak?

A. Well, that is about all I can actually recall that I can testify in court" (Tr. 331).

This was the extent of Eager's testimony on his direct examination.

Notwithstanding he also had been interviewed by a Committee investigator and testified before the House Un-American Activities Committee in 1938 (when his memory was obviously better), Eager admitted on cross-examination

that he did not then attribute the above statements to the Petitioner. He told the Committee that Petitioner "was a Communist" and he did "talk about a Soviet America being established", but he didn't say Nowak made that statement because "I wasn't asked that question in that way" (Tr. 344-345, 368-371).

On re-direct examination Eager identified the "closed meetings" as including gatherings "in the back of the book store" of "ten or twelve" of his fellow union members who "were likewise members of the Communist Party" (Tr. 374). At one of these gatherings Petitioner is supposed to have again told his hearers "We should be militant and aggressive and take a leadership in our plants" (Tr. 375). The witness was then asked whether:

> "At these meetings by the Communist Party members who were also members of the Ternstedt Union, was anything further said by Mr. Nowak on any occasion?
>
> * * * * * * * *
>
> A. Well, I think that I have answered that question four or five times.
>
> The Court: Well, can you add anything to it?
>
> A. The only thing I can recall him saying one night, at a meeting that was slightly different, I guess, and yet the same question of militancy and all that, and there was political action, the question was brought up at the meeting and he told us at that time that *we couldn't depend too much on the ballot to gain our objectives but that it would eventually resolve to bullets*, and it was by the same militancy of the workers in the plants that we, as leaders, would be able to establish a Soviet America" (Tr. 378). (Emphasis ours.)

On re-cross-examination the following colloquy ensued:

"Q. Then just to make it clear, your testimony is that the reason you never made that statement before, about the alleged—about bullets, that Mr. Nowak was supposed to have said, is because you claim you were never asked the question which would have logically permitted you to make such an answer?

A. That's right.

Q. That is your testimony?

A. Yes, sir.

The Court: Did anybody—we have had a recess since you made the original statement. Did you talk to anybody during the recess at all?

A. I talked to one man out there in the hall.

The Court: Who was it?

A. Representing the government, I guess, here.

The Court: Was the word "bullets" used out there?

A. No; we didn't talk anything about this case.

The Court: Well, Mr.—what is the name of this witness?

Mr. Goodman: Eager.

The Court: Mr. Eager, you were asked the question as to what he had said and you never mentioned bullets until after recess. Now, when did you get the idea of bullets?

A. Well, I might have—my impression of the question I was asked was relative to the meeting at Magnolia Hall.

The Court: It wasn't limited to that, I can tell you that.

A. That is my impression of it" (Tr. 383).

Any further comment on Eager's testimony would be superfluous; the unreliability of his seventeen year old recollection speaks for itself, and his effort to meet the insistence of the prosecution that some language indicative of "force and violence" be recalled, is a palpable afterthought. Yet this is the character of proof—which the Trial Court characterized as "clear, straight-forward, unequivocal and convincing."[57] And this is the evidence upon which sixteen years of otherwise exemplary citizenship is wiped away.[58]

It is of especial pertinence, we think in concluding this discussion of the Government's proofs, to quote the following views expressed in the Memorandum Opinion of District Judge Westover in *U. S. v. Kusnitz* (unreported No. 15446-HW, S.D. Cal., August 28, 1956). This also was a denaturalization proceeding, based upon alleged failure to disclose

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[57] In our discussion of the evidence we intentionally omitted any consideration of the books and pamphlets introduced as Government exhibit 3A-N and 3P (App., p. 147). Nowhere in its opinion does the Trial Court refer to those exhibits and we think it clear that the Court did not rely on them. In any event, however, the books were admitted conditionally upon the assurance by Government counsel that they would be tied in; even so, their admission was for the limited purpose of qualifying Nowell and Baxter as "experts." There was never any claim by the Government that Petitioner had read or was even aware of the existence of these exhibits. Finally, most of these exhibits were before this Court and were considered by this Court in either *Schneiderman* or *Yates* or both. If personal knowledge of the contents of these books was insufficient in those two cases to condemn admitted officers and members of the Party, *a fortiori*, the books do not establish illegal advocacy or knowledge here.

[58] It is sufficient to add only that, assuming the truthfulness of the above statement about "bullets," there is nothing in the statement that even faintly connotes advocacy of violence by either the Petitioner or the Party. Hence, the statement offers no support for the Trial Court's finding that Petitioner knew the Communist Party as an organization advocating violent overthrow of the Government.

Communist Party membership. In ordering judgment for defendant, Judge Westover said:

> "In filing its complaint the Government started upon the long and tedious task of establishing defendant's state of mind some twenty four years before. It is always difficult to establish an individual's state of mind, but that difficulty is enhanced manifold with the passing of years. Inasmuch as it was not possible to look into defendant's mind at the time of naturalization to determine her state of mind at that time, the Government attempted to establish the allegations of the amended complaint by showing the actions and conduct of defendant at the time of naturalization, and witnesses were called to testify as to what defendant did some twenty four years previously.
>
> Through years in presiding over trials, the Court has observed that witnesses often have difficulty recalling acts, statements and conduct of others which occurred in the relatively near past, and unless there are some peculiar circumstances to make an impression it is extremely difficult to recall the details of an event after the passing of many years. Innocent misrecollection, like failure of recollection, is not an uncommon experience; and this certainly is true after the passage of nearly a quarter of a century."

IV.

Petitioner's Citizenship Was Cancelled in Violation of Rights Guaranteed by the First and Fifth Amendments.

In this brief we have had several occasions (*supra*, pp. 34 (note 17), 41, 43) to interpolate brief references to First and Fifth Amendment issues which arise from acceptance of the Government's theory in this case, both as to the reach

of the denaturalization statute on its face and in its application to the evidence here. In each of these instances we have demonstrated how acceptance of Petitioner's contention avoids these constitutional issues.

It is not our intention to present here an extensive discussion of these constitutional issues. What we already have said is enough to show their magnitude and to suggest a holding that the statute cannot be constitutionally applied to Petitioner on this record, regardless of its constitutionality on its face. For, if we are correct in our view with respect to any of the three major propositions we have thus far advanced, then the judgment below must be reversed and the constitutional issues are not reached.[39] In the event none of these contentions is acceptable to this Court, only then is it necessary to reach and determine these constitutional issues.

A. Refusal of the Trial Court to Permit Petitioner, as a Basis for Cross Examination, to Examine Statements in the Government's Possession, Previously Made by Government Witnesses, Denied Petitioner a Fair Trial.

Our discussion of the evidence demonstrates, we think, that Nowell and Eager were the two chief prosecution witnesses; and it further demonstrates the prejudicial technique which the Government was permitted to employ of repeatedly asking these witnesses for their "recollections" and "further recollections" until eventually the witness purported to "recall" something that, in the Government's view, amounted to advocacy of force and violence.

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[39] Similar constitutional issues raised in *Schneiderman, supra*, were not reached for the reason that the evidence there was found to be insufficient.

Eager, after persistent pressing by Government counsel, finally injected into his account of a 1938 speech allegedly made by Petitioner, the following statement (Tr. 379):

> "... he told us ... we couldn't depend too much on the ballot to gain our objectives, but that it would eventually resolve to bullets ..."

And Nowell credited Petitioner with making the following initiation speech at a 1935 Party meeting where Petitioner was allegedly initiated into the Party (Tr. 457):

> "He went on to make a brief analysis of capitalism ... and I quote as nearly as possible ... he stated that the working class could never achieve its objectives or get its rights under capitalism, that it would be necessary to 'destroy' ... I am reasonably sure of the word destroy ... capitalism and set up a Government of the workers ... So he pledged his allegiance to the ... Communist Party ... and Communist International."

These two statements present the strongest evidence adduced by the Government on the issue of Petitioner's knowledge—a key issue in the Government's case. Obviously, the credibility of both of these witnesses was a material consideration for Petitioner's defense.

On cross-examination of Eager it was established that, in 1938, when his recollection was obviously fresher, he had given a question and answer statement to the Immigration Service (or the FBI) concerning Petitioner (Tr. 346, 351); and in that statement—as well as in his 1940 testimony before the House Un-American Activities Committee—Eager did not attribute the above comment to Petitioner. Defense counsel made a demand for production of this 1938 statement for purposes of cross-examination. He indicated that he was desirous of showing any inconsistency

between the witness' 1938 account and his present 1952 recollection of alleged Communist Party activities engaged in by Petitioner. The Trial Court, however, denied this request, stating (Tr. 348-350): "There is no discrepancy that has been shown".

Similarly, Nowell's seventeen year old recollection of the above-mentioned 1935 statement attributed to Petitioner, raised a material issue concerning Nowell's credibility. On cross-examination Nowell was not sure if he had attributed the above initiation speech to Petitioner when he testified before the House Un-American Activities Committee in 1939; and he could not recall if he had given such testimony in any other proceeding (Tr. 501). He was specifically asked and could not recollect if he had testified at all about Petitioner before the 1942 Grand Jury which had indicted Petitioner for alleged perjury in connection with his naturalization (Tr. 501-504). The Government, however, admitted in open Court that the witness had testified about Petitioner before the Grand Jury; but Nowell was uncertain as to what, if anything, he had told the Grand Jury about this alleged 1935 initiation speech (Tr. 504-505).

Defense counsel requested that "I be permitted to see this man's testimony before the Grand Jury, particularly with respect to two matters which have come up in this hearing on which there appears to be a reasonable doubt, I should say, that there is a discrepancy" (Tr. 507).

The Trial Court, however, ruled that "in fairness to him" the witness should be given an opportunity "to go over what he said before the Grand Jury, and then you can ask him questions" (Tr. 508). The Court also indicated that defense counsel would not be permitted to see the witness' Grand Jury testimony; but if (after reading his Grand Jury testimony) the witness' subsequent answers to defense counsel's questions revealed a discrepancy, then the Court, after

reading that portion of the Grand Jury's minutes would call the discrepancy to counsel's attention (Tr. 507-511) and permit further cross examination on the point. How counsel was to prepare for this cross examination remained unanswered.

The witness was temporarily excused from the stand in order that he might study his prior Grand Jury testimony. Upon his return (after an absence of several days) counsel was still left to surmise and guess as to possible conflicts between the witness' present and any prior account he may have given of this meeting (Tr. 1131-1132).[60]

Parenthetically, it should be observed here that the Trial Court's concern about the witness' inability to recall his appearance and testimony before the Grand Jury in 1942 is in startling contrast to the readiness with which this witness' detailed recollection of 1929, 1930 and 1935 events was accepted by the Court.

These two rulings of the Trial Judge had the effect of making it impossible for defense counsel to fully develop his cross examination of either Eager or Nowell. For all that appears Eager may have given an altogether different account in 1938 of what Petitioner is supposed to have said only a few months before; and certainly it would be material to know in just how much detail Nowell did go in his 1942 testimony before the Grand Jury with respect to that

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[60] Two inconsistencies were developed by defense counsel: Nowell testified here that he first met Petitioner in 1929 or 1930. Other Government witnesses had said Petitioner was in Chicago at that time (Tr. 1140). Before the Grand Jury, Nowell gave 1931 as the date of his first meeting with Petitioner (Tr. 1135-1145). Nowell further had testified that the above speech was made by Petitioner at a Party meeting in 1935 at which Petitioner was initiated into the Party, and that "punch" was served after the meeting. Before the Grand Jury, however, he described this meeting as a "banquet" in celebration of the completion of the election campaign (Tr. 1137).

1935 meeting at which Petitioner is supposed to have been initiated into the Party.

The ruling of the Trial Court in both of these instances was at variance with this Court's holding in *Jencks* (*supra*). This ruling alone requires a reversal here. For it is apparent that the Trial Court was of the view that counsel for Petitioner had first to establish an inconsistency before his request would be in order. This Court held otherwise in *Jencks*. It is also apparent that the reasoning of the Trial Court in permitting Nowell to examine the Grand Jury minutes, but refusing such permission to defense counsel, placed counsel in the identical position mentioned by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. 187, No. 14,694, and quoted in *Jencks* (77 S.Ct. at p. 1013, note 12).[61]

In the present posture of this record, both this Court and defense counsel are left to surmise what a review of Nowell's Grand Jury evidence concerning Petitioner, or Eager's statement to the Department of Justice, would show. Enough is given in this record, however, to establish that Nowell did testify there concerning this alleged "initiation" meeting though it is impossible to state whether or not he attributed the above utterances to Petitioner at that time. Similarly, there is enough in this record to show that Eager did include in his question and answer statement to the Department of Justice, references to his alleged Communist activities and to this Petitioner. If, as seems

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[61] "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? . . .

" . . . It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld? . . . " 25 Fed. Cas. at page 191.

evident, an examination of these prior accounts of these witnesses concerning their alleged activities involving this Petitioner would reveal that neither of them mentioned or failed to mention these alleged speeches or attributed the foregoing utterances to this Petitioner, this would be most material. For as this Court stated in *Jencks*:

> "The omission from the reports of facts related at the Trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Nor can *Jencks* be distinguished on the ground that the form of this proceeding is civil rather than criminal.[62] The opinion notes that in civil cases the Supreme Court has recognized the existence of a governmental privilege against disclosure of documents which it would be contrary to some vital national interest to make public. But *Reynolds* v. *United States*, 345 U.S. 1, which is cited in support of this statement, makes clear that for each of two separate reasons no such privilege applies here.

First, the *Reynolds* case holds (pp. 7-8) that a claim of executive privilege in a civil case will not be recognized unless (1) it is formerly asserted "by the head of the department which has control over the matter, after actual personal consideration by that officer", and (2) the tribunal to which the claim is asserted determines that the claim is warranted. Here no formal and personal assertion of the privilege was made by the Attorney General, and the Trial Court made its rulings without considering whether

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[62] But see *Klapprott* v. *United States*, 335 U. S. 601, where the standard of proof in a denaturalization case is likened to that in a criminal case; and of *Jordan* v. *DeGeorge*, 341 U. S. 223, 231, applying to a deportation proceeding the doctrine of unconstitutional vagueness.

any claim of privilege was justified and without information on which such consideration could be intelligently given.

Second, as *Reynolds* makes clear, a claim of privilege could not be honored in this proceeding even if appropriately invoked. *Reynolds* involved a suit *against* the government under the Tort Claims Act for damages resulting from the crash of a military aircraft. The government invoked its privilege when the plaintiffs sought production of the official accident investigation report of the Air Force. The Court noted (p. 12) that cases in the criminal field had held "that the Government can invoke its evidentiary privilege only at the price of letting the defendant go free". It then went on to state:

> "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum *where the Government is not the moving party, but is a defendant only on terms to which it has consented.* (Emphasis supplied.)

Here the litigation was initiated by the Attorney General as "the moving party". This is not a suit against the government "on terms to which it has consented". The Attorney General himself has possession of the Immigration Service and Grand Jury records requested. The purpose of the proceeding is to subject Petitioner to the drastic penalty of cancellation of citizenship and possible deportation. Obviously, it would be as unconscionable here as in a criminal case to permit the Attorney General to invoke a privilege against the production of such reports, which, as *Jencks* holds, are material to Petitioner's defense.

Finally, on this point, in a similar denaturalization proceeding, based upon alled failure to disclose Communist Party membership (*United States* v. *Matles*, 115 F. Supp. 261 (E.D.N.Y., Bruckhausen, *D.J.*)), defense counsel's request for specific reports made to the Government by informers later called as prosecution witness was denied. Judgment of cancellation of citizenship was entered. Subsequently, and following the *Jencks* decision, the Government conceded the error of the Trial Court in refusing to order production of the reports and the Trial Judge then set aside his Judgment, directed production of the reports, and reopened the trial for further cross-examination.

Since no valid claim of privilege was or could have been asserted by the Attorney General in this proceeding, the rule of the *Jencks* case is applicable.

It follows, therefore, that insofar as the findings of the Trial Court are predicated upon the testimony of Eager and Nowell, they must be set aside since they are based upon evidence not subjected to proper cross examination and thus denied to Petitioner a fair trial.

B. The Trial Court Applied the Statute in a Manner Violative of Petitioner's Rights Under the First Amendment.

We have shown that the 1906 Act, as amended, in effect at the time of Petitioner's naturalization, forbade the naturalization of persons who were opposed to organized government or members of an organization teaching such opposition. We likewise have shown that the concept of "teaching and advocating violent overthrow of the Government of the United States" was not introduced into the naturalization statute until the Act of 1940.

In *Schneiderman, supra*, which, like this case, involved an interpretation and application of the 1906 Act, the Trial

Court's finding as to membership in an organization proscribed by the statute, though inadequate to sustain its judgment, at least followed the language of the applicable statute. Even so, the findings were condemned by this Court because of their generality (*Schneiderman, supra*, at note 6).

Here, however, not only is the key finding made by the Trial Court as to organizational advocacy a material departure from the proscription contained in the applicable 1906 Act and the charge made in the Complaint; it is a departure that affected adversely Petitioner's rights under the First Amendment.*

While the applicable 1906 Act, as the Trial Court observed, was addressed to "anarchists", and the teaching of anarchy, the Complaint here (Par. 6) and the Affidavit (Par. 4(c)) adopts the language of the 1940 Act and charges that the Communist Party was an organization which "advised, advocated or taught overthrow by force and violence of the government of the United States". As we have shown (*supra*, note 20), these two concepts are substantially different; nor did Congress regard them as one and the same. The effect of this variance is that the Government here seeks to hold Petitioner responsible for compliance in 1938 with a statutory requirement which was not made by Congress until 1940.

But aside from this obvious and material variance between the organizational proscription contained in the 1906 statute and the character of the Communist Party as charged in the complaint, the error here is compounded by the fact that, as respects the Party, the Trial Court here found neither the organizational proscription con-

* A resident alien is entitled to the protection of the First Amendment. *Bridges* v. *California*, 314 U. S. 252.

demned by the 1906 statute, nor that set forth in the 1940 Act and alleged in the Complaint.[64]

The Trial Court made no finding as to "teaching" or "advocating" at all; although the statutory proscription in both the 1906 and 1940 statutes is expressed in terms of "teaching". Instead, the Trial Court found that the Party's "main aim and objective * * * was the overthrow of this government by force and violence." Thus, whether we apply the applicable language of the 1906 Act (" . . . teaching disbelief in or opposition to organized government") or that of the 1940 Act (" . . . advocates or teaches (1) the overthrow by force or violence of the Government of the United States")—and the Complaint here endeavors to charge both—it is clear that the Trial Court's finding as to "aims and objectives," repeated over and over again in its opinion, adopts the Government's erroneous theory of the charge.[65] The Court thus treats as one and the same thing an organization "teaching opposition to all organized government," an organization which "teaches and advocates violent overthrow of the government" and one which has as its "aims and objectives" the violent overthrow of the Government.

The error which inheres in thus misinterpreting the statute has First Amendment implications. As this Court recently reaffirmed in *Yates* v. *U. S.*, *supra*, a Congressional proscription against "teaching and advocating" has constitutional validity only in that limited area where it can

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[64] See the observation in *Schneiderman* at p. 160 to the effect that "the government should be limited, as in a criminal proceeding, to the matters charged in its Complaint."

[65] The Trial Court's confusion of these concepts probably stems from a misinterpretation of the statute inherent in the Government's inquiries and its witnesses' replies. Repeatedly, Government counsel inquired of his witnesses concerning "the aims and objectives" of the Party, rather than what was advocated or taught by the organization. (Tr. 317, 411-412, 426-427, 432-433, 1213-1217, 756, 761-762, 809.)

be said that what is proscribed is "action" or advocacy of action, as distinct from "belief" or advocacy of abstract ideas unaccompanied by incitement to action. To "teach and advocate" at least requires some affirmative action or conduct on the part of the organization and the alleged member. But to have certain "aims and objectives" does not connote any action whatever. Thus, to confuse "teaching" or "advocating" with merely having certain "aims and objectives", as the Trial Court did here, is to take the statutory proscription completely out of the realm of action and place it in the realm of belief and intent. This eliminates the one ingredient—action, as distinct from mere belief, speech or intention—essential to the constitutional validity of the proscription under the First Amendment.

In *Schneiderman*, at p. 158, this Court points up the difference made by the First Amendment between advocacy of action and advocacy of doctrine or prediction that is not calculated or intended to be presently acted upon:

> "Because of this difference we may assume that Congress intended, by the general test of 'attachment' in the 1906 Act, to deny naturalization to persons falling into the first category, but not to those in the second. Such construction of the statute is to be favored because it preserves for novitiates as well as citizens the full benefit of that freedom of thought which is a fundamental feature of our political institutions".

The action of the Trial Court, here, however, fails to preserve and to accord to Petitioner this constitutional difference.

The necessary effect of this failure is that the Trial Court, by its finding, condemns the Communist Party, and therefore, the Petitioner, not for what it allegedly did, but for what it allegedly aimed, intended or believed should be

done or predicted would happen. And, *a fortiori*, Petitioner is deprived of his citizenship because of an inferred approval by him of what the organization intended or believed and not because of his approval or participation in any wrongful conduct of the organization. Cf. *Weiman* v. *Updegraff, supra; Sweezy* v. *New Hampshire, supra.*

And, finally, even if all of the statements credited to Petitioner by the witnesses here and all of the teachings and advocacy attributed to the Communist Party are accepted as true, there is, nevertheless, a complete absence of showing here that the Communist Party ever advocated "concrete action" calculated to bring about the violent overthrow of our government. At most, all that the evidence here can be said to show is that the Party or some of its more vocal members on isolated occasions advocated or taught abstract doctrines of "overthrow". This, as *Yates* makes clear, would not be included within the proscribed area of advocacy even if the statute in effect at the time prohibited "advocacy of violent overthrow of the government."

For this Court has held that even advocacy of concrete action, to be condemned, must be shown to have been by "language of incitement" and to have occurred under circumstances which presented a clear and present (or probable) danger that such advocacy would be acted upon by its hearers with some resulting substantive evil within the power of Congress to prohibit. *Dennis* v. *United States, supra; Terminiello* v. *City of Chicago*, 337 U.S. 1, 4; *American Communications Assn.* v. *Douds*, 339 U.S. 382. Giving to the Government's evidence here every possible inference that could be drawn from it, there is still a complete absence of any proof and no finding that either Petitioner's alleged beliefs and advocacy or that of the Communist Party in the 1930's presented any danger to the Government of the United States.

CONCLUSION

For all of the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN AND ROBB

By /s/ ERNEST GOODMAN

/s/ GEORGE W. CROCKETT, JR.
Counsel for Petitioner
3220 Cadillac Tower
Detroit 26, Michigan

Woodward 3-6268

November 12, 1957.

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[fol. A-1] APPENDIX A—SUMMARY OF RECORD OF PETITIONER IN MICHIGAN STATE SENATE, 1938-1947

RECORD OF VOTES RECEIVED BY STATE SENATOR STANLEY NOWAK

Election Year	*Primary Election Votes* Democratic Ticket		*General Election Votes*	
1938	Stanley Nowak	8,941	Stanley Nowak	47,815 (Dem.)
	Joseph C. Roosevelt	8,751	Orville Hubbard	38,378 (Rep.)
	Sidney C. Gray	4,947		
	Louis J. Walters	3,623		
	Em. E. Nechczynski	2,298		
	David Crane	1,136		
	Andrew Dereniewski	520		
Source: MICHIGAN MANUAL 1939 page 217			Source: MICHIGAN MANUAL 1939 page 280	
1940	Stanley Nowak	9,644	Stanley Nowak	75,255 (Dem.)
	Joseph C. Roosevelt	7,637	W. Newton Hawkins	47,644 (Rep.)
	Richard E. Lamb	2,561		
	Jacob Dombrowski	2,197		
	Walter J. Karczewski	2,148		
	Carl P. Allman	1,909		
	John Kaminsky	1,380		
	John Ferency	1,343		
	Frank A. Semperger	1,182		
	A. Tishkowski	1,010		
	David H. Bergstedt	920		
	Raymond C. Wisniewski	751		
	Joseph S. Jarosz	617		
	John Uminski	236		
Source: MICHIGAN MANUAL 1941 page 251			Source: MICHIGAN MANUAL 1941 page 322	
1942	Stanley Nowak	8,487	Stanley Nowak	42,097 (Dem.)
	Joseph C. Roosevelt	2,404	W. Newton Hawkins	28,133 (Rep.)
	Milton A. Wagner	1,743		
	Jasper N. Howard	1,586		
	Fred Hicks	1,476		
Source: MICHIGAN MANUAL 1943 page 231			Source: MICHIGAN MANUAL 1943 page 291	
1944	Stanley Nowak	11,452	Stanley Nowak	93,944 (Dem.)
	James Soltesz	4,072	Joseph M. Ford	59,360 (Rep.)
	Grover G. Marschner	2,995		
Source: MICHIGAN MANUAL 1945 page 235			Source: MICHIGAN MANUAL 1945 page 304	
1946	Stanley Nowak	7,571	Stanley Nowak	58,785 (Dem.)
	John J. Plas	3,837	(no Republican candidate)	
	Joseph J. Mogor	1,631		
Source: MICHIGAN MANUAL 1947 page 233			Source: MICHIGAN MANUAL 1947 page 302	

[fol. A-2] LIST OF SENATE STANDING COMMITTEES TO WHICH STANLEY NOWAK WAS APPOINTED DURING HIS FIVE TERMS IN OFFICE

YEAR	COMMITTEES
1939	Apportionment Education Michigan State College Public Health & Social Aid Taxation (MICHIGAN MANUAL 1939, page 525)
1941	Apportionment Education Michigan State College Taxation Welfare and Relief (MICHIGAN MANUAL 1941, page 563)
1943	Agriculture Apportionment Normal Schools Insurance Taxation (MICHIGAN MANUAL 1943, page 545)
1945	Insurance Public Health and Social Aid Taxation (MICHIGAN MANUAL 1945, page 558)
1947	Insurance Labor Taxation (MICHIGAN MANUAL 1947, page 561)

[fol. A-3] List of Bills and Resolutions Introduced by Senator Stanley Nowak During His Ten Years in Office

Year 1939

Bill No.	*Subject matter as shown in Senate Journal*
351	Minimum wage and maximum hour labor standards. (introduced jointly with all Democratic Senators)
416	Child labor, licensing of minors.
417	Regulate employment of minors.
419	Revise and codify Workmens Compensation. (introduced jointly with all Democratic Senators)
471	Supplemental Welfare Appropriation.

Resolution

29	To investigate job selling.
33	To memorialize Congress to appropriate WPA funds.

Source: General Index, Michigan Senate Journal —1939, Vol. 2, page 2278

Year 1941

Bill No.	
40	Old Age Assistance appropriation.
56	Abolish rule of imputed negligence.
57	Rule on extent of contributory negligence.
58	Recovery of damages.
72	County Law Libraries, control of.
121	Child Labor, regulation of.
122	Child Labor, regulation of street trades.
137	Service men, privileges and immunities.
167	Employment bribes, prohibit taking of. (introduced with a Republican)
168	Insurance witness, prohibit coercion of.
169	Habeas corpus writs, granting of.
199	Common carriers, injury of passengers.
200	Statements of injured persons, used as evidence.
201	Medical records, disclosure of.
202	Highway construction, negligence in.
220	Students, teachers, prohibit dismissal of. (jointly with others)
233	Injunctions and restraining orders, jurisdiction of.
273	Schools, annexation to third class districts.

311 Injury or death actions, abolish rule of imputed negligence.
336 Social Welfare Dept., to create.
352 Wayne Law Library Building, authorize construction of. (jointly)
416 Habitual criminals, punishment of.
417 Court of Claims, jury trials.
418 School employees, negligence of to be actionable.

Source: General Index Michigan Senate Journal —1941, Vol. 2, page 2282.

Resolutions

#26 Complimenting Auditor General for proposing state owned housing corporation to build welfare homes in Detroit.
#27 Providing for investigation of alleged improper practices of Ford Motor Company.
[fol. A-4]
#30 Requesting information regarding applicants on old age waiting list.
#36 Maladministration of the state relief funds in certain cities of this state.
#40 Funds to defray necessary expenses of the investigation of certain charges of maladministration of state relief funds.

Concurrent Resolutions

#26 Establishment of migratory worker camps by Federal Government.
#28 Urging Michigan Congressmen to sign petition to bring the Poll Tax Bill to floor of House of Representatives of U. S.
#63 Requesting and authorizing State Administrators Board to allot appropriations so that action of civil service commission may be put into immediate effect.
#66 Urging national leadership of both parties to give full aid and assistance to countries fighting Hitler.

Source: General Index, Michigan Senate Journal —1941, Vol. 2, page 2282.

YEAR 1943

Bills

165 Huron-Clinton Metropolitan Authority, amendments to law regarding.

166 Board of County Institutions, creates.

188 Vacancies, county offices, election for unexpired terms (joint bill)

246 Minors, employment of, prohibit under 14 years of age.

257 Unemployment Compensation Act, amendments. (jointly introduced)

Resolutions

14 Exchange of seats.

29 Requesting civil service commission to grant wage increases to employees of state hospitals and penal institutions

Concurrent Resolutions

11 Memorializing the President and Congress to enact the Pepper-Kilgore Bill.

Source: General Index, MICHIGAN SENATE JOURNAL —1943, page 1385

YEAR 1945

Bills

209 Amend the Michigan Unemployment Compensation Act.

362 Michigan Health Insurance Act, provides medical care and hospitalization through pay-roll tax, establish economic security fund.

Joint Resolutions

M Permit citizens 18 years of age to vote (jointly introduced)

Resolutions

29 Regarding three powers conference, congratulating U. S. President.

[fol. A-5]

30 Thanking Mr. Hittle for banquet (jointly with all Senators)

Source: General Index, MICHIGAN SENATE JOURNAL —1945, page 1582

YEAR 1947

Bills

118 Funds for county law library
126 Negligence, remove as defense engagement in charitable or non-profit enterprises.
173 Create fair employment practice commission (jointly introduced)
217 Abolish 15% discount to liquor licensees (jointly introduced)
242 Discharge, parole, or leave of absence of insane.
251 Amend Workmens Compensation Act.
261 Impose income tax on corporations.
262 Reduce sales tax from 3% to 2%.
263 Levy income tax on net income.
310 Permit employees period to vote without wage loss.
349 Amend workmens compensation act.
354 Provide formula for maximum and minimum terms of subsequent sentence (jointly introduced)
355 Good time allowance for prisoners. (jointly introduced)
356 Parole before expiration of minimum term. (jointly introduced)
357 Permit sentencing judge to change state prison sentence to probation. (jointly introduced)
364 Banks, permit closing all day Saturdays.
373 Amend municipal employees retirement act re change from one unit of government to another.
372 Amend state employees retirement act covering change from one unit of government to another.

Joint Resolutions

I Permit legislature to set salaries of state officers.
J Permit legislature to set their salary by concurrent resolution.
M Removal of tax uniformity clause from constitution. (jointly introduced)

Source: General Index, MICHIGAN SENATE JOURNAL —1947, Vol. 2, pages 1893-94.

Resolutions

16 Expressing condolences to family of Edmind C. Shields. (jointly)
36 Expressing confidence in integrity of Senator Tripp. (jointly)

Concurrent Resolutions

28 Requesting civil service commission to establish 40 hour week for all employees.

Source: General Index, Michigan Senate Journal 1947, Vol. 2, page 1894.

[fol. A-6] Appendix B—Copy of Indictment of Petitioner, 1942

Vio: Sec. 414, USC, Title 8,
(Sec. 23, Act of June 29, 1906.
34 Stat. 603)

United States of America
In the District Court of the United States for the Eastern District of Michigan Southern Division

Of the November Term, A.D., 1942

Eastern District of Michigan
SS
Southern Division

The Grand Jurors of the United States of America, sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present that heretofore, to-wit: on the 15th day of December, 1937, at the City of Detroit, in the County of Wayne, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, one

Stanley Nowak, alias
Stanley Novak, alias
Stanislaw Nowakowski, alias
Stanley Nowakowski, alias
Stanislaw Nowak,

late of the City of Detroit, aforesaid, defendant herein, did unlawfully, wilfully and knowingly in a naturalization proceeding held pursuant to the Act of Congress approved June 29, 1906, give false testimony and did make an affi-

davit false as to material fact required to be proved in such proceeding, in violation of Section 414, Title 8, USC, as amended. (Sec. 23 of the Act of June 29, 1906, 34 Stat. 603) commonly known and referred to as the Naturalization laws of the United States.

And the Grand Jurors aforesaid, upon their like oaths do further present that on the day and date aforesaid, defendant was an alien, being a native and citizen of Poland; that on the day and date aforesaid defendant filed with the Clerk of the United States District Court for the Eastern District of Michigan at Detroit, Michigan, a Petition for naturalization, said petition bearing number 112043, which said petition was directed to the Clerk of the United States District Court for the Eastern District of Michigan and is now on file and is a record of said Court to which petition reference is hereby made.

And the Grand Jurors aforesaid, upon their like oaths do further find and present that the said defendant particularly violated the provisions of Section 414, Title 8, USC, as amended (Sec. 23 of the Act of June 29, 1906, 34 Stat. 603) in that, on the day and date aforesaid, he subscribed and deposed in said petition for naturalization that he was then and there an alien who was not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, as required by the second subdivision of Section 4 of the Naturalization Act of June 29, 1906; that he further subscribed and deposed in said petition for naturalization that he had resided continuously within the United States for at least five years immediately preceding the date of his petition for naturalization, and within the County in which said petition was filed for at least six months, and that during all the periods referred to he had behaved as a person of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, as required by Subdivision 4 of Section 4 of the Naturalization Act of June 29, 1906, and that said petition for naturalization was in the

form of an affidavit, subscribed and sworn to by the said defendant, on to wit: the 15th day of December A.D. 1937; [fol. A-7] that at the time of filing said petition for naturalization said defendant appeared before Merritt S. Duboise, Deputy Clerk of the United States District Court for the Eastern District of Michigan, at Detroit, Michigan, who was then and there a person duly authorized by law to administer oaths in naturalization proceedings and did affirm under oath the truth of all matters set forth in said petition for naturalization.

And the Grand Jurors aforesaid, upon their like oaths do further present and find that in truth and in fact the said defendant at the time of filing his petition for naturalization aforesaid was affiliated with an organization or body of persons teaching disbelief in organized government, to wit: the Communistic Party, sometimes known as The Communist Party of the U.S.A., and, again, as the Communist Party of Michigan, and that the said defendant was then and there an alien who had not during the period of five years immediately preceding the filing of his petition for naturalization behaved as a person of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, in that he had, on various occasions within said period of five years immediately preceding the filing of his petition for naturalization, acted and behaved as a person who was affiliated with an organization or body of persons teaching disbelief in organized government, not of good moral character, not attached to the principles of the Constitution of the United States and not well disposed to the good order and happiness of the United States, all of which at the time of filing of said petition for naturalization and the making of the affidavit in said petition for naturalization, as aforesaid, the said defendant well knew.

And the Grand Jurors aforesaid, upon their like oaths do further find and present that the affidavit in said petition for naturalization, which was false as aforesaid, was false as to a material fact required to be proved in said

naturalization proceeding: All of the foregoing being contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

JOHN C. LEHR
United States Attorney

By: .....
John W. Babcock
Assistant U.S. Attorney

This is a true bill

.....
Foreman

[fol. A-8] APPENDIX C—PLEADINGS AND OPINIONS OF LOWER COURTS

COMPLAINT TO CANCEL CITIZENSHIP

(Filed Dec. 23, 1952)

The United States of America, by Philip A. Hart, United States Attorney for the Eastern District of Michigan, by J. Connor Austin, Assistant United States Attorney for said district, herewith presents its complaint under and pursuant to Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158 (Sec. 738(a), USC, Title 8), and respectfully represents:

1. That the said Stanislaw Nowak was, prior to June 13, 1938, a native and citizen of the Republic of Poland;

2. That the said Stanislaw Nowak entered the United States on October 21, 1913, at New York, New York, and thereafter resided in the United States and now resides in the United States and in this judicial district, his last known place of residence being 5573 French Road, Detroit, Michigan;

3. That on December 15, 1937, the said Stanislaw Nowak filed Petition for Naturalization No. 112043, in the United States District Court for the Eastern District of Michigan, Southern Division, at Detroit, Michigan, pursuant to the

Act of May 25, 1934, in which he represented and set forth under oath as follows:

(a) That he fully believed in the form of government of the United States; that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country.

(b) That he was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that [fol. A-9] he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and that he would renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty of which he was a subject.

(c) That he would support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion.

4. That at the preliminary hearing on his petition for naturalization, on December 15, 1937, the defendant Stanislaw Nowak was asked, under oath, by the Naturalization Examiner whether or not he had ever been a member of the Communist Party and he answered in the negative;

5. That on June 13, 1938, the said Stanislaw Nowak took an oath of allegiance to the United States in open court which reads as follows:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against

all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion; So Help Me God."

whereupon the United States District Court for the Eastern District of Michigan, Southern Division, at Detroit, Michigan, relying upon the truth and good faith of the representations made by the said Stanislaw Nowak, in [fol. X-10] his petition for citizenship, and other Immigration and Naturalization forms required of a petitioner for naturalization, and in his oral testimony before the Naturalization Examiner, granted the prayer in his petition and entered its order admitting him to citizenship of the United States, and thereupon Certificate of Naturalization No. 4493619 was issued to him by the Clerk of the Court;

6. That the representations aforesaid made by the said Stanislaw Nowak in his petition for citizenship, and before the Naturalization Examiner, as well as the oath which he took as described above, were false and fraudulent, and at the time of making said representations and taking said oath said defendant knew that they were false and fraudulent, in that the said defendant concealed the fact that he was a member of and affiliated with the Communist Party of the United States from the year 1935 until the date of his naturalization, and the Communist Party of the United States was an organization which during the years from 1935 to 1938, inclusive,:

(a) Advised, advocated, or taught the overthrow by force or violence of the government of the United States;

(b) Advised, advocated, or taught the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the government of the United States because of his or their official character;

(c) Advised, advocated, or taught the unlawful damage, injury, or destruction of property;

(d) Advised, advocated, or taught sabotage;

(e) Wrote, circulated, distributed, printed, published, or displayed, or caused to be written, circulated, dis- [fol. A-11] tributed, printed, published, or displayed or had in their possession for the purpose of circulation, distribution, publication, issuing, or display, written and printed matter which advised, advocated, or taught the performance of the acts described in subparagraphs 1(e), I, II, III, and IV;

(f) Promoted, influenced, and advanced the political activities, public relations, and public policy of the Union of Soviet Socialist Republics.

That during the years 1935 to 1938, inclusive, the Communist Party of the United States was a section of an international organization whose principal officers were citizens or subjects of foreign countries and the principal offices of which were situated in Moscow, in the Union of Soviet Socialist Republics; that decisions made by such international organization were binding upon other Communist parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not;

That the said Stanislaw Nowak, at all of the times above mentioned, was familiar with and approved of the activities, aims and teachings of the Communist Party, as set forth above;

7. That the said Stanislaw Nowak deliberately and intentionally testified falsely in the course of his naturalization proceeding, and wilfully concealed the material facts as set forth in the preceding subparagraphs, in order to prevent the making of a full and proper investigation of his qualifications for citizenship; to induce the Immigration and Naturalization Service to make an unconditional [fol. A-12] recommendation to the court that his petition be granted; to preclude inquiry by the court concerning his qualifications for citizenship; and to procure naturalization in violation of law;

8. That the United States Attorney instituted this proceeding upon the certificate of Reubien Speiser, an attorney

for the Immigration and Naturalization Service, United States Department of Justice, showing good cause therefor, which affidavit is attached hereto and made a part hereof;

9. That the said order of admission to citizenship and certificate of naturalization for said Stanislaw Nowak were fraudulently and illegally procured, in violation of the fourth subdivision of Section 4 of the Act of June 29, 1906, (34 Stat. 3592) in that he was not a person who had, during the three years preceding the filing of his application for naturalization, behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and, despite his oath to the contrary, he intended to preserve his allegiance to an international organization;

WHEREFORE, plaintiff prays that an order be entered in this cause revoking and setting aside the order heretofore entered admitting the said Stanislaw Nowak to citizenship, upon petition No. 112043, and cancelling Certificate of Naturalization No. 4493619, heretofore issued to Stanislaw Nowak, on the ground of fraud and illegality; and further ordering that said certificate shall be delivered and surrendered to the Clerk of the United States District Court for the Eastern District of Michigan, and transmitted by him to the Commissioner of Immigration and Naturalization, [fol. A-13] Washington, D.C., and that the Clerk of this Court forthwith transmit a certified copy of this order to the Commissioner of Immigration and Naturalization, Washington, D.C.; and that the said defendant be forever restrained and enjoined from claiming any right, privilege, benefit or advantage whatsoever under said certificate of naturalization or order admitting him to citizenship; and for such other and further relief as may be proper.

PHILIP A. HART
United States Attorney

J. CONNOR AUSTIN
Assistant U.S. Attorney

AFFIDAVIT OF REUBEN SPEISER

C-4493619

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, ss.:

Reuben Speiser, being duly sworn, deposes and says:

1. That he is an Attorney, Immigration and Naturalization Service, United States Department of Justice, and as such has access to the official records of the said Service, from which the following facts appear:

(a) That one STANISLAW NOWAK filed a petition for naturalization in the United States District Court at Detroit, Michigan on December 15, 1937, and was admitted to citizenship by that court on June 13, 1938, receiving certificate of naturalization No. [fol. A-14] 4493619.

(b) In the proceedings which led to his naturalization the said Stanislaw Nowak alleged under oath:

(I) That he fully believed in the form of government of the United States; that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country.

(II) That he was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and that he would renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty of which he was a subject.

(III) That he was not and never had been a member of the Communist Party.

[A-24]

Form A-2214
U. S. DEPARTMENT OF LABOR
IMMIGRATION AND NATURALIZATION SERVICE

5/-44/34

APPLICATION FOR A CERTIFICATE OF ARRIVAL
and
PRELIMINARY FORM FOR PETITION FOR NATURALIZATION

No. 8 138752

For use in searching records of arrival:

RECORDS EXAMINED	RECORD FOUND
Card index	Place
Index books	Name NOWAK, STANISLAW
Manifests	
	Date 10/2/13
	Manner Per S.S. Zaan

Use Form 160-Im. in issuing certificate of arrival on this application.

TO THE APPLICANT: Do not write above this line. Read carefully and follow the instructions on last page hereof.

Take or mail this application and your money order to

IMMIGRATION AND NATURALIZATION SERVICE,
439 New Federal Building,
DETROIT, MICH.

Date June 28, 1937

RECEIVED JUN 29 1937 IMMIGRATION AND NATURALIZATION SERVICE

I, Stanislaw Nowak, residing at 5573 French Road
Detroit (City or town) Wayne (County) Michigan (State), desire to file petition for naturalization in the Court at Detroit (City or town) Michigan (State), in accordance with the naturalization law. I submit herewith a statement of facts to be used in filing such petition, two photographs of me, each of which I have signed, and my declaration of intention (first paper), if one is required.

See instructions on page 4 hereof, paragraph entitled "Money Order." If you are not exempted therefrom and must secure a money order in payment for a certificate of arrival and fill in the blank below:

I hereby apply for a certificate of arrival showing my lawful entry into the United States for permanent residence, and inclose money order No. _____ in the sum of $2.50 made payable to the order of the "Commissioner of Immigration and Naturalization, Washington, D.C.," in payment for the certificate of my arrival.

I arrived in the United States through the port of New York City (City or town) New York (State or country) under the name of Stanislaw Nowak, on October 11 (Month) 1913 (Year), on the vessel S. S. Potsdam

Additional facts to aid in locating a record of my arrival:

1. I have ____ used another name in this country than that given above. (If so) It was Stanley Nowak
   I used that name because It is the Americanized version of my name.
2. The full name of the person shown on my steamship ticket was Stanislaw Nowak
3. I was born in Prussgral (City or town) Poland (Country) on [illegible] (Month) [illegible] (Day) 1908 (Year)
4. My father's full name is/was John Nowak
5. My mother's maiden name was Anna Pinkowicz
6. (If a married woman) My husband's name was ____
7. My last foreign residence was Prussgral
8. The place where I took the ship or train which landed me in the United States was Rotterdam, Holland
9. The ticket on which I came to this country was bought at Prussgral
10. (If arrival by ship) Name of steamship line was Holland American
    Class, second or third cabin Third I arrived as a passenger, stowaway, seaman, member of crew, or otherwise: ____
11. I traveled on (no immigration visa, a passport, or permit to reenter) Passport
12. My original Immigrant Identification Card No. ____ is hereto attached. If not herewith, it is because I entered this country before such a card was in effect.
13. I paid $ ____ head tax on ____
14. I was ____ examined by United States immigration officers at Ellis Island (Place) New York (State or country)
15. (If not examined, state why, and give the circumstances of your entry) ____
16. The person in the United States to which I was coming was my father, John Nowak
17. The place in the United States to which I was going was Chicago, Illinois
18. The names of some of the passengers or other persons I traveled with and their relationship to me, if any, are Konstantyna Nowak, Katherina Lewicka (a friend of my sister's)

I was previously in the United States from ____ to ____

RECEIVED JUL 23 1937 RECORDS DIVISION ELLIS ISLAND, N.Y.

(IV) That he would support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion.

(c) That the allegations of said Stanislaw Nowak as set forth in subparagraph 1(b) were false and untrue as more particularly set forth below.

(d) That said Stanislaw Nowak was an active member of the Communist Party of the United States from about 1935 until the date of his naturalization and [fol. A-15] has continued such membership until the present time.

(e) That the said Stanislaw Nowak and the said Communist Party of the United States at all of the times mentioned herein:

(I) Advised, advocated, or taught the overthrow by force or violence of the government of the United States;

(II) Advised, advocated, or taught the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the government of the United States because of his or their official character;

(III) Advised, advocated, or taught the unlawful damage, injury, or destruction of property;

(IV) Advised, advocated, or taught sabotage;

(V) Wrote, circulated, distributed, printed, published, or displayed, or caused to be written, circulated, distributed, printed, published, or displayed or had in their possession for the purpose of circulation, distribution, publication, issuing, or display, written and printed matter which advised, advocated, or taught the performance of the acts described in subparagraphs 1(e), I, II, III, and IV;

(VI) Promoted, influenced, and advanced the political activities, public relations, and public policy of the Union of Soviet Socialist Republics.

(f) That at all of the times above mentioned, the Communist Party of the United States was a section of an international organization whose principal officers [fol. A-16] were citizens or subjects of the Union of Soviet Socialist Republics and the principal offices of which were situated in Moscow, in the Union of Soviet Socialist Republics; that decisions made by such organization were binding upon other Communist Parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

(g) That at all times since 1935 the said Stanislaw Nowak bore allegiance to the Union of Soviet Socialist Republics; that at the time of his admission to United States citizenship the said Stanislaw Nowak did not intend to renounce or abjure his allegiance to the Union of Soviet Socialist Republics, but on the contrary intended to retain his allegiance to such foreign power.

(h) That the said Stanislaw Nowak intentionally and deliberately made false statements in the proceedings leading to his naturalization as set forth in the preceding paragraphs in order to prevent the making of a full and proper investigation of his qualifications for citizenship; to conceal his lack of attachment to the principles of the Constitution; to induce the naturalization examiner to make an unconditional [fol. A-17] recommendation to the court that his petition be granted; to preclude inquiry by the court concerning his qualifications for citizenship; and to procure naturalization in violation of law.

2. That the naturalization of said Stanislaw Nowak was illegally and fraudulently procured in that:

(a) He was not a person of good moral character at the time of his naturalization because he made false

statements in the proceedings leading to his naturalization, as more particularly set forth in paragraph 1.

(b) He was not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States inasmuch as he was then and theretofore had been an active member in the Communist Party of the United States, an organization which, to his knowledge, espoused the aims, objectives and programs more particularly set forth in paragraph 1(e);

(c) He deliberately and intentionally made false statements in the proceedings leading to his naturalization as more particularly set forth in paragraph 1; that such false statements were made for the purposes set forth in paragraph 1(h); and

(d) He did not intend to support the Constitution and [fol. A-18] laws of the United States and renounce all foreign allegiance inasmuch as he intended to and did retain allegiance to the Union of Soviet Socialist Republics.

3. That good cause exists for the institution of a suit under Section 338(a) of the Nationality Act of 1940 (8 U.S.C. 738(a)) to set aside and cancel the naturalization of Stanislaw Nowak as having been illegally and fraudulently procured.

4. That the last known place of residence of said Stanislaw Nowak is 7525 Wykes, Detroit, Michigan.

/s/ Reuben Speiser
Attorney

Subscribed and sworn to at Washington in the District of Columbia this 3rd day of December, 1952, before me, the General Counsel of the Immigration and Naturalization Service, United States Department of Justice, authorized by Section 60.26 of Title 8 of the Code of Federal Regulations to administer oaths.

/s/ L. Paul Winnings
General Counsel

[fol. A-19] AMENDMENT TO AMENDMENT TO COMPLAINT TO CANCEL CITIZENSHIP PURSUANT TO AGREEMENT AT THE PRE-TRIAL HEARING

(Filed July 8, 1953)

The United States of America, by Fred W. Kaess, United States Attorney for the Eastern District of Michigan, and Dwight K. Hamborsky, Assistant United States Attorney, amends Paragraph 3 of its Complaint to Cancel Citizenship in accordance with amendments agreed upon at the pre-trial hearing on June 22, 1953, as follows:

3. That on December 15, 1937, the said Stanislaw Nowak filed Petition for Naturalization No. 112043, in the United States District Court for the Eastern District of Michigan, Southern Division, at Detroit, Michigan, pursuant to the Act of May 25, 1934; that during the course of the naturalization process he set forth under oath as follows:

(a) That he fully believed in the form of government of the United States; that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country;

that this statement was made in application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization filed with the District Director, Immigration and Naturalization Service, Detroit, Michigan, on or about July 19, 1937; that a photostatic copy of the said application and preliminary form is attached hereto and made a part of this complaint;

(b) That he was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that [fol. A-20] he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and that he would renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty of which he was a subject;

that this statement was made in his Petition for Naturalization; that said petition is on file with the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division, at Detroit, Michigan;

(c) That he would support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion;

that this statement was made in open court, as hereinafter more fully set forth in Paragraph 5;

With reference to request of defendant in Paragraphs 2 and 3 of his motion for documents or transcripts relating to allegations in Paragraph 4 of the complaint, plaintiff states that the preliminary hearing referred to in Paragraph 4 of the complaint was oral and there was no statement taken from the defendant; consequently there are no transcripts to be made available to the defendant.

FRED W. KAESS
United States Attorney

/s/ Dwight K. Hamborsky
DWIGHT K. HAMBORSKY
Assistant U. S. Attorney

Dated: June 8, 1953.

[fol. A-21] ANSWER TO AMENDED COMPLAINT

(Filed July 27, 1953)

Now comes the defendant and in answer to the Complaint as amended, says:

1. Defendant admits the allegations contained in paragraph one.

2. Defendant admits the allegations contained in paragraph two except that his residence is 7525 Wykes, Detroit, Michigan.

3. Answering paragraph three, defendant admits that he filed his Petition for Naturalization on December 15, 1937 in the District Court at Detroit, Michigan. Defendant admits that he took the oath contained in sub-section (c) of said paragraph. Defendant refers to the Certificate of Arrival and Petition for Naturalization for the exact statements made by him under oath and admits that he made said statements, rather than in the form shown in sub-sections (a) and (b) of said paragraph.

4. Answering paragraph four defendant denies the allegations therein contained.

5. Answering paragraph five, defendant admits that he took the oath of allegiance in open Court on June 13, 1938 as set forth in said paragraph. Defendant has no knowledge as to the facts relied upon by the District Court in granting his citizenship and therefore denies said allegations.

6. Answering paragraph six, defendant denies the allegations contained therein.

7. Answering paragraph seven, defendant denies the allegations contained therein.

[fol. A-22] 8. Answering paragraph eight, defendant shows that the Certificate of Reuben Speiser is based upon hearsay and contains conclusions of fact and law, that said Certificate is not in the form required by law and moves that it be stricken from the Complaint.

9. Answering paragraph nine, defendant denies the allegations contained therein.

Special Defenses

First: An indictment was issued against the defendant by a Federal Grand Jury in this District in the November Term, 1942 (District #26899) based substantially upon the same grounds as set forth in the Complaint herein. Reference is hereby made to the files and records of said proceeding. Said indictment was dismissed on February 8, 1943 upon motion of the Attorney General of the United States. The filing of the Complaint herein, ten years after

the dismissal of said indictment based upon substantially the same allegations, constitutes an abuse of the process of this Court and a denial of due process, and plaintiff is precluded, under equitable principles, from obtaining the relief prayed for in its Complaint.

Second: Section 338(a) of the Nationality Act of 1940 on its face and as applied to this defendant is unconstitutional under the First and Fifth Amendment to the Federal Constitution.

Third: The judgment of naturalization rendered in favor of the defendant on June 13, 1938 by this Court is res adjudicata, and may not be attacked in these proceedings. [fol. A-23] Defendant denies the remaining allegations in the Complaint and moves that the Complaint be dismissed.

GOODMAN, CROCKETT, EDEN & ROBB

By EBNEST GOODMAN
Attorneys for Defendant
3220 Cadillac Tower
Detroit 26, Michigan
Woodward 3-6268

in sign school in Chicago. Also, individual reading and study.

25. Have you read the following oath of allegiance? Yes.

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to [illegible] of whom (which) I have heretofore been a subject (or citizen); that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So HELP ME GOD.

Are you willing to take this oath in becoming a citizen? Yes.

26. If necessary, are you willing to take up arms in defense of this country? Yes.

Did you claim exemption from the draft during the World War because you were an alien? No. I was too young.

Did you surrender your declaration (first paper) at that time? N. O.

27. If not now married, have you ever been married? I am married. Are you divorced? No.

Are you a believer in the practice of polygamy? No.

28. Are you a believer in anarchy? No. Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? No.

29. Have you ever been an inmate of an insane asylum? No.

30. Have you ever been dependent upon public charity? No.

31. Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation? No. If so, give full particulars

(a) In what place in the United States did you meet for the first time your first witness named on the opposite page Detroit (City or town) Michigan

How often have you seen this witness each month since the date you first met him (her)? Yearly - 1925 to 1926 At least semi-monthly since

At what places? At his or my place of residence, or with friends when in Detroit.

(b) In what place in the United States did you meet for the first time your second witness named on the opposite page? Detroit (City or town) Michigan

How often have you seen this witness each month since the date you first met him (her)? (About same as 1st witness)

At what places? At his or my place of residence or with friends. Lived at his home 6 months.

I certify that all the statements made by me in this application and form are true to the best of my knowledge and belief.

Thereupon I administered the oath prescribed by law.

No. 24947

Upon my request. X 14—9811

Stanislaw Mazur

5573 French Road - Detroit, Mich.

[A-25]

I have set forth below my answer to the following questions asked of me:

19. Have you been absent from the United States since the date of your arrival as stated on page 1 of this form? No.

If so, state month and year you left ....; month and year you returned ....

To what country did you go? .... For what reason? ....

Is this the only time you have been out of the United States? ....

If not, give full particulars as to other absences ....

20. In what places in the United States have you resided?

Chicago (City or town)	Illinois (State)	From	August October December	1932 1913 1928	to	March September March 1933 1924 1932
Detroit (City or town)	Michigan (State)	From	September March	1924 1933	to	December 1926 to date June 1937
So. Bend (City or town)	Indiana (State)	From	March	1932	to	August 1932 (Month) (Year)

21. What were the names and addresses of your employers during the five years immediately prior to the date of this statement?

Unemployed for two years previous to following employment

Detroit Gasket & Mfg. Co. (March 1934 to Sept. 1934) 12640 Burt St. Detroit, Mich.

Buying old-gold (Sept. 1934 to Jan. 1936) working for myself.

Mr. Harry Schram & Co. (Jan. 1936 to July 1936) 511 Cass Ave. Detroit, Mich.

(he formerly owned the Dr. Samuel Lustgarten Co. now out of business.

22. Do you understand the principles of government of the United States? Yes.

23. Do you fully believe in the form of government of the United States? Yes.

24. Are you ready to answer questions as to the principles and form of government of the United States? Yes.

What have you done to prepare yourself for an examination on the government of the United States? Study of Civics in high school in Chicago. Also, individual reading and study.

25. Have you read the following oath of allegiance? Yes.

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to .... of whom (which) I have heretofore been a subject (or citizen); that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So HELP ME GOD.

Are you willing to take this oath in becoming a citizen? Yes.

26. If necessary, are you willing to take up arms in defense of this country? Yes.

[A-26]

TRIPLICATE
(To accompany monthly report on Form 2208)

b+2

ITED STATES OF ERICA

PETITION FOR NATURALIZATION

No.

To the Honorable the District Court of U.S. at Detroit

The petition of Stanislaw Nowak, hereby filed, respectfully shows:

(1) My place of residence is 2878 French Road, Detroit, Mich. (2) My occupation is Engineer Rep. U.A.E. of Am.

(3) I was born in Przemysl, Poland on March 14, 1903 My race is Polish

(4) I declared my intention to become a citizen of the United States on admitted under act of 5-24-1924

Court of , at

(5) I am married. The wife or husband is Margaret

we were married on May 31, 1925 at Plymouth, Indiana; he was

born at Snohomish Co., Washington on May 3, 1903; entered the United States

at on for permanent residence therein, and now

resides at Detroit, Michigan with me I have no children, and the name, date,

and place of birth, and place of residence of each of said children are as follows:

(6) My last foreign residence was Przemysl, Poland I emigrated to the United States of

America from Rotterdam, Holland My lawful entry for permanent residence in the United States

was at New York, N.Y., under the name of Stanislaw Nowak

on October 21, 1913, on the vessel SS Potsdam

as shown by the certificate of my arrival attached hereto.

(7) I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to

the Republic of Poland

of whom (which) at this time I am a subject (or citizen). And it is my intention to reside permanently in the United States. (8) I am able to speak the English language. (9) I have resided continuously in the United States of America for the term of five years at least immediately preceding the date of this petition, to wit, since

October 21, 1918 and in the County of Wayne

this State, continuously next preceding the date of this petition, since March 1923, being a residence within said county of at least six months next preceding the date of this petition.

4469

[redacted] the [redacted] day of [redacted]

[redacted] and in the County of [redacted]

[redacted] being a resident within said county of at least

[redacted] and said petition was denied by that Court for the following reasons and causes, to wit:

[redacted] that my name be changed to [redacted]

I, [redacted] sworn, depose and say that I have read the foregoing petition and know the contents thereof; that the same is true of my own knowledge, except as to matters stated to be alleged upon information and belief, and that as to those matters I believe it to be true; and that this petition is signed by me with my full, true name.

[redacted]

AFFIDAVITS OF WITNESSES

[redacted] residing at [redacted] Detroit, Mich., and

[redacted] residing at [redacted] Detroit, Mich., citizens of the United States of America, that he has personally known and has been

[redacted] the petitioner above mentioned, since [redacted] and that to the personal knowledge the petitioner has resided in the United States continuously preceding the date of filing this petition, of which this affidavit is a

part, to wit, since the date last mentioned, and at [redacted] in the County of [redacted]

in which the aforementioned petition is made, continuously since [redacted] and that he has personal knowledge that the

petitioner is a person of good moral character, and that to the opinion the petitioner is in every respect entitled to be admitted a citizen of the United States.

[redacted] [redacted]

Subscribed and sworn to before me by the above-named petitioner and witnesses in the office of the Clerk of said Court at [redacted]

this [redacted] day of [redacted] Anno Domini 19[redacted] I hereby certify that certificate of arrival No. [redacted]

from the Department of Labor, showing the lawful entry for permanent residence of the petitioner above named, [redacted]

[redacted] of such petitioner, has been by me filed with, attached to, and made a part of this petition on this date.

[redacted] Clerk. (SEAL)

By [redacted] Deputy Clerk.

[A-27]

(P.132)

Nowak, Stanislaw
5573 French Rd
Det

, 27
19 26

Home
Husband

ADJOURNMENTS

FROM—	TO—	REASONS	EXAMINER
		Dis Def wife from 1st mar fld	Hurley
1-26-38		Grant	Hurley

FINAL HEARING

ADMITTED OR DENIED

Date JUN 13 1938

Grounds

Examiner

RESULT OF EXAMINATION

Poland Cr-3/22/38 Rew

To Present Wife 1st Mar
Cert & Dec Decree and
Pres Mar Cert

Nov. 23, 1928

Exhib. Div. Decree #26959 issued/in/Superior Court of St Joseph Co., at South Bend, Indiana, to Margaret Jones, Pltf., vs Owen Jones, Def. on grounds set forth in the complaint. Pltf's maiden name, Margaret Collingwood, restored.

O. K. - Cal 1/10/38

Landgraf
7/15-Default

M to W/P
U.S. 10-21-13

Fee — 0
Garn — 0
Exp — 0

Def not home first time
Pltf not home second time

maiden name, Margaret Collingwood, restored.
O. K. - CAW 1/10/38

Exhib. Marr. Ctf., showing Stanley Nowak and Margaret Collingwood were married May 31, 1935 at Plymoutn, Marshall Co.Ind.,by Chas.E.Anderson, a Justice of the Peace.
O. K. - CAW 1/10/38

Birth Cert of Sarah Margaret Collingwood 5-3-08- Snohomish Washington

1926 - sued for $5 - 1/2 - case settled for $1 - wife divorced 1st time 1927 - 1930

(Says was republican so to be a citizen - says U.S.W. Rather be an alien)

1st domiciles and necessary two-fifths of grounds

+9 Dec 1936 - Outside Auto strike - Pet was speaking to the strikers about getting them food to carry on strike and to hold the fort - a nice & clean - held 1/2 hr and released at Campbells Flats - Sec. which is some cases

6. My last foreign residence was ... Przemysl ... Poland
   The place where I took the ship or train which landed me in the United States was ... Rotterdam ... Holland
7. The foreign country of which I am now a subject or citizen is ... Poland
8. I can ... speak English.
9. I have resided continuously in the United States since ... October ... 21 ... 1913
   I have resided continuously in the county where I now live since ... March ... (about the 10th) ... 1933
10. I have Never previously made petition for naturalization (second paper). If so, it was No. ..., made in the ... Court at ... on ... and was not granted because ...

(3) If you wish to have your name changed, give full name you desire ... None

Give names, occupations and addresses of two citizens you expect to bring with you as witnesses when you appear for examination to file your petition. These witnesses must have personal knowledge of your residence in the county at least, and of your character and other qualifications. A foreign-born witness must bring proof of his citizenship).

(1st) Richard Landgraf ..., Laborer. Employee of City of Detroit.
residing at ~~1926 Burlington~~ - Detroit, Mich.
I first met this witness on ~~Early summer of 1926~~ 1927

(2d) Cecil E. Armitage ..., ~~Civil Servicer Office of City Tax~~ Collector
residing at 664 Charlotte St. - Detroit, Mich.
I first met this witness on ~~March~~ ~~1933~~ 1932

I certify that the above statement of facts has been read by me and that the statement is true to the best of my knowledge and belief.

NOTE.—Have you enclosed (if required)—
DECLARATION OF INTENTION.
IMMIGRANT IDENTIFICATION CARD.
TWO PHOTOGRAPHS OF YOURSELF.
x 10—cm MONEY ORDER FOR $2.50.

... Louis Lant Harrah
(Petitioner's address)
6573 French Road - Detroit, Michigan
(Address at which applicant receives mail)

Wayne Co Oct 12 1/34

[A-28]

No.

STATEMENT OF FACTS TO BE USED IN FILING MY PETITION FOR NATURALIZATION

My name is {Mr / Mrs / Miss} Mr. Stanislaw Nowak
(Full true name, without abbreviation, and any other name which has been used, must appear here)

1. My present residence is 5573 French Road (Number and street) Detroit (City or town) Wayne (County) Michigan (State)
2. My occupation is Business Representative for the United Automobile Workers of America
3. I was born in Przemysl (City or town) Poland (Country) on March (Month) 14 (Day) 1903 (Year) My race is Polish (See page 6)
4. I declared my intention to become a citizen of the United States (first paper) on 7/3/44 (Month) (Day) (Year) in the ... Court of ... at ... (City or town) (State)
5. I am married. The name of my wife or husband is Margaret Collingwood
6. We were married on May 31 1935 at Plymouth (City or town) Indiana (State)
7. She was born at Snohomish County, Washington U.S.A. on May 8 1908 (Month) (Day) (Year)
8. She arrived in the United States at ... for permanent residence and now resides at Detroit (City or town) Michigan (State); was ... naturalized at ... (City or town) (State)
9. Certificate No. ... issued.
10. I have No children, whose names, dates and places of birth, and places of residence are as follows:

NAME	DATE AND PLACE OF BIRTH	NOW RESIDING AT

11. My last foreign residence was Przemysl Poland
12. The vessel on which I last arrived in the United States was ... Port of ...

[A-29]

INSTRUCTIONS TO THE APPLICANT

Pages 1, 2, and 3 of this form must be completely filled out (preferably on a typewriter)

Immigrant Identification Card.—Every alien who entered the United States for permanent residence on the basis of an immigration visa on or after July 1, 1928, should be in possession of an immigrant identification card bearing a number in red ink. If you arrived on or after the above date, you must attach such card to this application, inserting the number thereof in the appropriate blank space on the first page of this form. If you arrived on or after July 1, 1928, and you do not have an immigrant identification card, either because it is lost or destroyed, or you did not receive such card, you should state the facts in Statement No. 12 on the first page.

Photographs.—You are required to send with this application two photographs of yourself taken within 30 days of the date of this application. These photographs must be 2 by 2 inches in size, must not be pasted on a card or mounted in any other way, must be on thin paper, have a light background, and clearly show a front view of your face without hat. Snapshots, group, or full-length portraits will not be accepted. Both of these photographs must be signed by you on the margin and not on the face or the clothing.

Money Order.—If you are not within one of the classifications named below, you must secure a money order in the sum of $2.50, payable to the order of the "Commissioner of Immigration and Naturalization, Washington, D. C." This money order, which is in payment for the issuance of a certificate of your arrival in the United States, must be attached to this application when you send or take it to the immigration and naturalization office at the address given on the first page of this form. You are not required to send a money order if (1) your arrival occurred on or before June 29, 1906; or (2) your declaration of intention (first paper) is dated on or after July 1, 1929; or (3) you have heretofore filed a petition for naturalization after July 1, 1929; or (4) you are otherwise exempted by law from the requirement for a certificate of arrival.

Date of Your Arrival.—If you do not know the exact date of your arrival in the United States, or the name of the vessel or port, and you cannot secure this information by consulting your family or friends who came over with you, give the facts of your arrival as you remember them in the appropriate blank spaces on the first page of this form. If you have a passport, ship's card, or baggage labels, they may help you to answer these questions.

Race and Nationality.—In furnishing information as to your race in Statement No. 8, page 3, "race" is to be determined from the original stock or blood of your ancestors and the language you speak, as distinguished from "nationality", which means the country of which you are a citizen or subject. For instance, a person may be of French blood or stock but owe allegiance to Great Britain. In that case "race" would be French and "nationality" British. For your information there follows a partial list of races or peoples:

Albanian	Filipino.	Magyar.	Servian.
Armenian.	Finnish.	Mexican.	Slovak.
Belgian.	Flemish.	Montenegrin.	Slovenian.
Bohemian.	French.	Moravian.	Spanish.

two original stock or blood of your ancestors and the language you speak, as distinguished from "nationality", which means the country of which you are a citizen or subject. For instance, a person may be of French blood or stock but owe allegiance to Great Britain. In that case "race" would be French and "nationality" British. For your information there follows a partial list of races or peoples:

Albanian	Filipino.	Magyar.	Servian.
Armenian.	Finnish.	Mexican.	Slovak.
Belgian.	Flemish.	Montenegrin.	Slovenian.
Bohemian.	French.	Moravian.	Spanish.
Bosnian.	German.	Negro.	Spanish American.
Bulgarian.	Greek.	Pacific Islander.	Swiss.
Chinese.	Hebrew.	Polish.	Syrian.
Croatian.	Hercegovinian.	Portuguese.	Turkish.
Cuban.	Irish.	Rumanian.	Ukrainian.
Dalmatian.	Italian.	Russian.	Welsh.
Dutch.	Japanese.	Ruthenian (Russniak).	West Indian (other than Cuban)
East Indian.	Korean.	Scandinavian (Norwegians, Danes, and Swedes).	
English.	Latvian.	Scotch.	
Estonian.	Lithuanian.		

The term "Cuban" refers to the Cuban people (not Negroes); "West Indian" refers to the people of the West Indies other than either Cubans or Negroes; "Negro" refers to the African black, whether coming from Cuba or other islands of the West Indies, North or South America, Europe, or Africa. Any alien with admixture of blood of the African Negro will be classified as "Negro."

PENALTY FOR FALSELY SWEARING IN NATURALIZATION CASES

Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined not more than one thousand dollars and imprisoned not more than 5 years. (35 Stat. 1137; U. S. C., t. 18, sec. 142.)

RESULT OF EXAMINATION

TO THE APPLICANT—*Do not write on these lines*

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U.S. GOVERNMENT PRINTING OFFICE 16-

Examiner .....

But before considering "all facts" or "degree of proof" required, this court immediately eliminates government's claim as to the first "illegality" as a ground for revoking defendant's citizenship because both parties agree that the Nationality Act of 1906, in effect when Nowak was naturalized, must govern this contention.

The prohibitions of the Nationality Act of 1906 were primarily directed at polygamists and anarchists; not communists. In addition to being captioned "Anarchist or Polygamist" the statute is couched in language definitive of the tenets of anarchism as opposed to communism. It covers "disbelief in" and "opposition to" organized government and the unlawful assaulting and killing of government officials. On the other hand, seldom, if ever, has dispensation with all government been considered a tenet of communism. Contrarily the very essence of communism is its complete subjugation of all persons to the will of the state —under that doctrine, a political leviathan.

This court concludes, therefore, that nothing contained in Section 7 of the Nationality Act of 1906, 34 Stat. 598, being Title 8 U.S.C. Section 364, barred naturalization of one because he was a member of the Communist Party. But, while Illegality "a" is therefore erased, we still must [fol. A-32] treat subsection 4 of the Nationality Act of 1906, 45 Stat. 1513, Sec. 6(b) being Section 382 of Title 8 U.S.C., separately herein.

This court further dismisses, as of itself a sole ground for revoking defendant's citizenship, plaintiff's first contention of fraud—to-wit, that defendant was asked by the naturalization examiners whether he had ever been a member of the Communist Party of the United States to which he supposedly answered "No." We do this because in our opinion proof on this point is not "clear, unequivocal, and convincing." The two naturalization examiners, both testifying more than sixteen years after they had first interviewed petitioner, claim they remembered asking Nowak at the time of the original examination if he "was or had ever been a member of the Communist Party of the United States." These witnesses gave several reasons for so remembering among them that they had previous to such examination heard he was a communist and that he was

notorious, his name having appeared in the newspapers many times. This, they, in effect said, made them "primed" for Nowak when he did appear.

But, although both examiners had made written notations on the examining petition of Nowak's answers to certain questions that were not part of the written petition, still for some reason or other, this all important question, "Are you now or have you ever been a member of the Communist Party?" is not even referred to in their written answers or their notes. These examiners have interviewed hundreds of persons seeking naturalization during the intervening years and it seems to this court inconceivable [fol. A-33] that after having seen and interviewed defendant only once that they could remember asking one specific question of one specific petitioner after all those years. If they had asked such a question wouldn't they have made a note of it some place as they did concerning many less important questions not included in the petition as a question to be asked? We do not seek to impugn the veracity of these two witnesses nor to imply that they deliberately gave false testimony. We simply feel that the lapse of years, fallibility of the memory, and information about Nowak received later had a tendency to influence their testimony at the time of trial. This evidence fails to meet the standard required in denaturalization cases.

Standing alone we dismiss the first fraud.

Findings of Fact

Defendant filed his petition for citizenship on December 15, 1937 and became a citizen June 13, 1938. From all testimony received, this court has arrived at the conclusion that defendant became a member of the Communist Party about the middle of 1935, that he continued as a member of the party at least through 1937 and 1938, knowing of its main aim and objective which was the overthrow of this government by force and violence; that he approved of that aim and objective before and when he became a member of the Communist Party of the United States; that so far as we have been able to ascertain, he still does to this day; and further that he intended to conceal such membership and such knowledge both when he signed his petition

[fol. A-30] OPINION OF THE COURT
(Entered July 15, 1955)

Action to cancel defendant's citizenship pursuant to provisions of the Nationality Act of 1940, Title 8 U.S.C. 738 (a) on grounds that his naturalization under Nationality Act of 1906 was illegally and fraudulently procured.

I. AS TO ILLEGALITY

That:

(a) Defendant concealed and falsely denied communist party membership;

(b) he was not at the time of his naturalization a person of good moral character, attached to the principles of the Constitution of the United States; and

(c) was not well disposed to the good order and happiness of the United States.

Note: This court believes that the facts required to prove (b) and (c) would be the same and therefore we treat these two as one.

II. AS TO FRAUD

That:

(a) Defendant was asked by the naturalization examiners whether he had ever been a member of the Communist Party of the United States to which he falsely answered, "No"; and

(b) answering question No. 28 in his preliminary petition for naturalization defendant denied he had ever belonged to, or had ever been affiliated with, any organization which taught or advocated overthrow of the existing gov-
[fol. A-31] ernment in this country, when in fact he was a member of the Communist Party with knowledge that it taught and advocated such violent overthrow of this government.

If plaintiff is to prevail it must prove at least one of its contentions by "clear, unequivocal, and convincing" evidence. Schneiderman v. United States, 320 U.S. 118.

and when he was examined. This evidence came from many [fol. A-34] witnesses, some of whom stated they had attended closed communist party meetings from 1937 to 1943 at which defendant was present. Their testimony, with one exception, which we have ignored completely (Thaddeus Zygmont) was clear, straightforward, unequivocal and convincing.

Witness BUDENZ:

Attended closed Communist Party functionary meetings with Nowak from late 1937 until 1943 or 1944; knew Nowak to be a Communist Party member for these years; attended enlarged National Committee meetings of Communist Party with Nowak, one in 1938 and two in the forties.

Witness FOUNTAIN:

Attended closed Communist Party meetings in Detroit with Nowak from June 1937 through 1938; knew Nowak to be a Communist Party member; attended Communist Party schools where Nowak lectured on "Strategy of the Communist Party in relation to labor, and rise of Hitler."

Witness EAGER:

Nowak solicited Eager's membership in Communist Party in 1937; knew Nowak was a Communist Party member and attended many closed Communist Party meetings from 1937 through 1938.

Witness NOWELL:

Knew Nowak was a member; he solicited Nowak's membership; was present at his induction; attended closed Communist Party meetings from 1935 through 1936 with Nowak.

[fol. A-35] Witness HEWITT:

Knew Nowak to be a member of the Communist Party in 1938; collected Communist Party dues from Nowak in 1938 and 1939; attended closed Communist Party meetings with Nowak.

Witness RENO:

Knew Nowak to be a Communist Party member from July or August 1937 to December 1938; attended func-

tionary meetings with Nowak; closed Communist Party meetings and an enlarged National Committee meeting in December 1938 with Nowak. Also saw his Communist Party card.

Witness RATAJ:

Attended one closed Communist Party meeting with Nowak in fall of 1937.

Witness HERBSTER:

Attended one closed Communist Party meeting with Nowak in summer of 1937.

Such testimony remains unimpeached though subjected to thorough cross-examination. In addition, none of it has been contradicted and it is overwhelming.

We agree that mere membership in an organization does not prove knowledge of its aims and objectives and that "utterances of its more vocal members cannot be imputed" to Nowak to show that he accepted or believed in the principles of the organization. See United States v. Hauck, 155 F. 2d 141. But here we are not concerned with belief or acceptance. It is sufficient if it is shown that defendant knew what the aims and objectives of the Communist Party were at the time he was a member and naturalized, and it is well recognized that external circumstances, such [fol. A-36] as communication of facts, is available to show that consciousness or knowledge ensued as a result thereof. See Wigmore on Evidence, Volume I, Second Edition, Section 244-245; Frankfeld v. United States, 198 F. 2d 679.

As to the aims and objectives of the Communist Party, this court in United States v. Charnowola, 109 Fed. Supp. 810 stated:

> "Both here and Russia it is now apparent that at all times the Communist Party aimed to destroy America by force and violence."

This language was quoted with approval in Sweet v. United States, 211 F. 2d 118; cert. denied, 348 U. S. 817. In fact, in view of the many decisions we believe it cannot now be seriously questioned but that the ultimate aims and objectives of the Communist Party include the violent and forceful overthrow of this government.

See Communications Association v. Douds, 339 U.S. 382; Carlson v. Landon, 342 U.S. 524; and Harisiades v. Shaughnessy, 342 U.S. 580. But if proof was further needed in the case at bar we hold that the government has met that requirement and also that defendant remained a member of the Communist Party knowing such aims and objectives and approved thereof.

This court also finds that because of his position in the community Nowak was more valuable to the Communist Party than the ordinary member. His membership in fact was so sacrosanct as to be kept secret from other members although he was known to have given lectures in the communist school, attended closed meetings (including enlarged national committee meetings where only the most trusted [fol. A-37] leaders were in attendance) and that he was well known in the communist center of New York. This is all about the time (before and after) he became an American citizen and defendant's conduct, though subsequent to his naturalization, is competent to show his state of mind at the time of his naturalization. Orth v. United States, 142 F.2d 969; United States v. Schlotfeldt, 136 F.2d 935. We believe the fact that he kept his membership secret was counseled by knowledge on his part that certain inconsistencies existed between United States citizenship and membership in the Communist Party. Conduct, which forms a basis from which inferences may be drawn, is evidence. Hupman v. United States (C.A. 6) 219 F.2d 243. In any event the concealment is not viewed with charity by this court.

This court also finds that defendant answered "No" to question No. 28 of his original petition, "Do you belong to or are you associated with any organization which teaches or advocates * * * overthrow of existing government in this country?"

Conclusions of Law

The Nationality Act of 1906, Section 4, 34 Stat. 598, under which defendant was naturalized, did have the provision that no alien should be admitted to citizenship unless a person

"of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

And also that Congress enacted legislation in 1918 adding to the other exclusions from admittance to the United States of aliens

[fol. A-38] "who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches:

(1) the overthrow by force or violence of the government of the United States or of all forms of law, • • •

(g) Any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in this subchapter." Section 137(c) and (g), Title 8 U.S.C.

Defendant admittedly answered question No. 28 in his preliminary petition denying that he was a member of any organization that advocated overthrow of this government. Therefore, since at the time defendant petitioned for naturalization the Communist Party had been held to be and was an organization advocating the overthrow of this government by force and violence (United States v. Curran, 11 F.2d 683; Jurgans v. Seaman, 25 F.2d 35; Antolish v. Paul, 283 F. 957; Skeffington v. Katzeff, 277 F. 129; United States v. Wallis, 268 F. 413; Kjar v. Doak, 61 F.2d 566) a fact well known to defendant, we conclude that defendant by answering question No. 28 in the negative intentionally concealed his membership in the Communist Party of the United States. Therefore this court holds that proof of those facts constitutes ground for cancellation of his citizenship. He was not then a person

"of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

To enlarge upon our rationale; when defendant in ques-
[fol. A-39] tion No. 28 denied that he was a member of any such organization, he was and he knew he was such a member, having knowledge of its aims and objectives. Therefore it was not only illegal for him to become a citizen of the United States but in concealing Communist Party membership he committed a fraud.

This court said in United States v. Charnowola, supra:

> "* * * every applicant for citizenship must come in with clean hands. There can be no fraud in the securing of that citizenship, whether that fraud be failure to disclose what it is obvious must be material or be an outspoken misrepresentation. Under some circumstances silence may be as reprehensible as a false statement."

Defendant's failure to make proper disclosure was not innocent. The concealment was deliberate—dictated by a desire to mislead lest what he was seeking would be denied.

Further, also, in considering defendant's attachment to the principles of the Constitution. Here we are dealing with a state of mind, to-wit—defendant's intention at the time he swore allegiance to this country. Our guide is defendant's own words and conduct both prior and subsequent to his oath. Knauer v. United States, 328 U.S. 654; Orth v. United States and U. S. v. Schlotfeldt, supra. What more could be necessary?

Through the thirties this defendant was a militant communist. At one time he said, referring to the actions of the members of the Communist Party—

> "* * * the goal of all this activity was to extend the Soviet system around the face of the earth."

[fol. A-40] Note the words—"the Soviet System"—Was defendant attached to the principles of our Constitution?

The court has carefully read Schneiderman v. United States, supra, and Baumgartner v. United States, 322 U.S. 665, two controlling opinions in denaturalization cases. We think this case distinguishable from those two for the reason that Nowak's conduct does not consist of sporadic expressions indicating that all cultural ties with the mother-

land have not been severed. Indeed the rivalry here is not between land of birth and land of adoption, but between the latter and a political ideology. Furthermore, while vocal outbursts often belie the mind, no such disparity exists between thought and continuous, systematical conduct. We also note that in the Baumgartner and Schneiderman cases the defendant took the stand and explained away the allegedly incriminating statements. In this case defendant did not. Failure to do so has often been the subject of judicial comment. See Luria v. United States, 231 U.S. 9 at page 19. It has been held even in criminal cases that

> "* * * where the party having the burden makes a probable case on an issue as to which the accused has peculiar knowledge of the facts and may easily prove them and the prosecution cannot, an inference arises that the truth is with the prosecution." Williams v. United States, 170 F.2d 319.

Certainly defendant would know better than any other person what his state of mind was at a given time. Yet defendant did not see fit to testify nor did he offer to explain his failure to do so.

Citizenship is priceless and courts are reluctant to take it away once it has been given. But in cases where it is shown [fol. A-41] that it was wrongfully obtained courts have no alternative but to rectify the wrong.

Judgment for plaintiff.

/s/ Frank A. Picard
United States District Judge

July 15, 1955.

Order of Cancellation

At a session of said Court held in the Federal Building, at Detroit, Michigan, this 9th day of August, 1955.

Present: The Honorable Frank A. Picard
United States District Judge

Upon the records and files of the above action and from a full hearing in open court, and in accordance with an opinion filed July 15, 1955, and on motion of Dwight K. Hamborsky, Assistant United States Attorney for the Eastern District of Michigan,

IT IS ORDERED, ADJUDGED, AND DECREED that the order of this Court entered on June 13, 1938, admitting the defendant Stanislaw Nowak as a citizen of the United States of America, be and the same is hereby revoked, set aside and declared void, and that the Certificate of Naturalization issued by virtue of said order of June 13, 1938, be and the same is hereby cancelled and held to be null and void, and

[fol. A-42] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk of this Court transmit to the Immigration and Naturalization Commissioner at Washington, D. C., a certified copy of the judgment, order and decree, together with the original certificate of naturalization of the defendant, if in his possession; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Stanislaw Nowak be and he is hereby forever restrained and enjoined from setting up or claiming any rights, privileges, benefits or advantages whatsoever under said order of June 13, 1938, or under the Certificate of Naturalization issued by virtue of said order.

/s/ FRANK A. PICARD
United States District Judge

Dated: Aug. 9, 1955.

[fol. A-43] UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12765

STANISLAW NOWAK, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 12768

REBECCA MAISENBERG, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the United States District Court for the Eastern District of Michigan, Southern Division.

Decided November 26, 1956

OPINION

Before: SIMONS, *Chief Judge;* MARTIN and MILLER, *Circuit Judges.*

PER CURIAM. These two denaturalization proceedings were tried separately in the district court and heard separately on appeal from orders entered by United States District Judge Picard of the Eastern District of Michigan, revoking orders granting citizenship to appellants and canceling certificates of naturalization issued to them respectively on June 13, 1938, and on January 24, 1938.

Upon consideration of the briefs, the oral arguments and the records in these two cases, we find that all the points of law made and argued by appellants—except the question of whether the affidavit of good cause in each of the

cases was sufficient to confer jurisdiction upon the district court—have been adjudicated adversely to the contention of appellants in the opinion of this court, affirming judgments of denaturalization entered, respectively, by United States District Judges Levin, Thornton, and Picard, of the Eastern District of Michigan, in *Sweet* v. *United States*, *Chomiak* v. *United States*, and *Charnowola* v. *United States*, 211 F. (2d) 118 (C. A. 6), decided February 19, 1954. Our opinion in those cases cited relevant Supreme Court opinions: *Knauer* v. *United States*, 328 U.S. 654; *United States* v. *Ginsberg*, 243 U.S. 472, 475; *Schneiderman* v. *United States*, 320 U.S. 118; *Dennis* v. *United States*, 341 U.S. 494, 498; *Biau* v. *United States*, 340 U.S. 159, 161; and also the opinion of Chief Judge Simons of this court in *Albertson* v. *Millard* (E.D. Mich., 1952), 106 F. Supp. 635, 642, 643, 644.

[fol. A-44] The findings of fact of the district judge in each of the cases now under review were supported by substantial evidence and certainly were not clearly erroneous; and the conclusions of law in both cases were based upon logically correct reasoning and supported by highest authority.

Appellants argue that the required affidavits of good cause were insufficient to confer jurisdiction upon the district court. When boiled down, the argument is that the affidavit of good cause filed in each of these cases was based on hearsay and was not evidentiary in character. It is contended that the opinion of the Supreme Court in *United States* v. *Zucca*, 351 U.S. 91, holds that an affidavit showing good cause is a procedural prerequisite to maintenance of denaturalization proceedings, that the government attorney must file an affidavit showing good cause, and that "the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship".

In our judgment, the affidavit of an attorney of the Immigration and Naturalization Service of the United States Department of Justice reciting facts appearing in the official records, such as the affidavit filed in each of these cases, was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case. The affidavit thus set forth sufficient evidentiary matters to show good cause for

cancellation of the citizenship of each appellant. Fairly construed, the affidavit states facts appearing in the official records of the Immigration and Naturalization Service. It would be too stringent a requirement to hold that the good cause affidavit need embrace testimony of prospective witnesses. The affidavits in issue gave fair and sufficient notice of the facts charged as a basis for cancellation of citizenship of the appellants as to apprise them properly of the facts and reasons upon which their citizenship was sought to be revoked. Appellants were thus sufficiently apprised of the charges as to be prepared to meet the proof thereof, if they had been able to do so.

Upon the entire record, we are of opinion that the United States proved the allegations upon which the certificates of naturalization were canceled, by clear, unequivocal and convincing evidence.

The order or judgment of the district court in each case is affirmed.

Judge Miller concurs in the result.

[fol. A-45] APPENDIX D—LIST OF BOOKS AND PAMPHLETS INTRODUCED IN EVIDENCE BY THE GOVERNMENT

The following books and phamphlets were introduced by the Government:

(a) "The Communist Manifesto," by Carl (sic) Marx and Frederick Ihgals (sic), by International Publishers, Inc.,

(b) "State and Revolution," by V. I. Lenin, copyrighted 1932 by International Publishers, Inc.,

(c) "Left Wing Communism and Infantile Disorder" (sic), by V. I. Lenin, copyrighted by International Publishers, New York, 1940.,

(d) "Program of the Communist International," copyrighted by Workers Library Publishers in 1929, third edition printed in February, 1936;

(e) "Foundations of Leninism," by Joseph Stalin, copyrighted in 1939 by International Publishers, Inc.,

(f) "The Communist Party. A Manual on Organization," by J. Peters, published in 1935 by the Workers Library Publishers;

(g) "The Struggle Against Imperialist War and the Tasks of the Communists" published by Workers Library Publishers, second edition of July, 1934;

(h) "Why Communism," by M. J. Olgin, published by Workers Library Publishers, December 1933;

(i) "Why Every Worker Should Join the Communist Party," published by Workers Library Publishers, Inc., no printing date being shown;

(j) "Problems of Leninism," by Joseph Stalin, copyrighted in 1934 by International Publishers Company, Inc.,

(k) "The Ultimate Aim," copyrighted in 1935 by International Publishers Company, Inc.,

(l) "Report to the Eighth Convention Communist Party," by Earl Browder, 1934, published by Workers Library Publishers;

(m) "Resolutions of the Seventh Congress of the Communist Internationale," published in 1935, Workers Library Publishers;

(n) "The Twenty-One Conditions of Admission into the Communist Internationale" by O. Piatnitsky, published by Workers Library Publishers.

[fol. A-46] APPENDIX E—A DOCUMENTATION OF THE POLITICAL CLIMATE OF THE 1930's

The 1930's, on a world scale, was a period of hardship, economic collapse, unrest, ferment, change—attempts at new remedies.

> The Brookings Institution, *The Recovery Problem in the United States* (Washington, 1936); p. 43.

The United States suffered as deeply as the rest of the world.

Broadus Mitchell, *Depression Decade* (Vol. IX of The Economic History of the United States) (New York, Rinehart, 1947), p. viii.
U.S. Bureau of the Census, *Historical Statistics of the United States, 1789-1945* (Washington, D.C., 1949).

National income fell from $87.4 billion in 1929 to $39.6 billion in 1933, and averaged only $67.0 billion during the five-year period 1935-39.[1] Wage and salary receipts fell from $50.0 billion in 1929 to $28.7 billion in 1933, and an average of $42.1 billion in the five-year period of 1935-39.[2] Unemployment, as officially estimated, reached an all-time peak of 11,842,000 in 1933, and averaged 8,293,000 during the five year period of 1935-39.[3] Forced sales of farms reached a record of 54.1 per 1,000 in 1933.[4]

An unprecedented number of 9,106 banks were suspended in the years 1930-33, 4,004 of them in 1933, when all banks were temporarily closed.[5]

It was a period of seeking for panaceas for our economic and social problems.

Denis W. Brogan, *The Era of Franklin D. Roosevelt* (Vol. 52, The Chronicles of America Series, Allan Nevins, Ed.) (Yale U. Press, New Haven, 1951) pp. 12-16.

Theories of curing the depression by monetary manipulation were popular (Lombard, Warren & Pearson, Fisher), trade association control of production (Swope Plan), government planning (McAdoo, LaFollette, Brandeis), government spending (Keynes).

Daniel R. Fusfeld, *The Economic Thought of Franklin D. Roosevelt and the Origins of the New Deal* (New York, Columbia U. Press, 1956,) p. 190.
Ibid., pp. 191-206.

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[1] U.S. Bureau of the Census, *Historical Statistics of the United States, 1789-1945* (Washington, D.C. 1949) p. 12, A-117.
[2] Ibid., p. 13, A-135.
[3] Ibid., p. 65, D-65.
[4] Ibid., p. 95, E-8.
[5] Ibid., p. 273, N-135.

The philosopher, John Dewey, implied support for extremely radical measures:

> Superficial treatment of the basic causes which have produced a depression, not only in the United States but throughout the world, will not end the depression. It may help some of the victims—but at best only temporarily.
>
> [fol. A-47] Emergency measures imply that they are directed to meet an emergency, but the present world wide chaos is not a condition from which the world can emerge on a basis of assured and general prosperity, without fundamental changes in the economic systems of every major nation, except Russia.[6]

The tendency of government was toward enactment of measures previously regarded as radical.

> Arthur M. Schlesinger, Jr., The Broad Accomplishments of the New Deal, in *The New Deal, Revolution or Evolution?* Edwin C. Rozwenc, ed., (Heath & Co., Boston, 1949), p. 98.
>
> Maury Maverick, *In Blood and Ink* (Modern Age, New York, 1939), p. 147.

New needs created new, untried methods and organizations to support them.

> To the small zealous group of the American Communists, the depression seemed a vindication of their preaching. Among the educated classes, and especially the young professional writers, teachers and technicians, they won some recruits. So did other radical groups. For a moment, the panacea of technocracy seemed the answer to tens of thousands perplexed by the sight of so much technical capacity and material resources unused. The inventor of this doctrine was an enemy of the money system. National accounts should be kept in units of energy, and with the free

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[6] Professor John Dewey in People's Lobby *Bulletin*, June, 1933, quoted in Benjamin C. Marsh, *Lobbyist for the People* (Public Affairs Press, Washington, D.C., 1953) p. 99.

release of the national resources that would follow from throwing off thraldom to finance, every American family could have the equivalent of an annual income of $20,000. In their despair, thousands clutched at the hopes thus held out, and for months, technocracy was the main conventional theme of conversation.[7]

Denis W. Brogan, *The Era of Franklin D. Roosevelt* (Vol. 52, The Chronicles of America Series, Allan Nevins, Ed.) (Yale U. Press, New Haven, 1951) p. 109.

The President and the Government made statements, took actions, and enacted legislation which reflected and encouraged these trends.

Franklin D. Roosevelt, *Second Inaugural Address,* January 20, 1937 in *Vital Speeches,* Feb. 1, 1937.
Franklin D. Roosevelt, Campaign Speech, October 31, 1936, N.Y., in *New York Times,* Nov. 1, 1936.

Unions were forming and growing, political organizations were also being formed or changed, were expanding or fading away as people sought solutions.

Trade union membership increased from 2,857,000 in 1933 to 8,980,000 in 1939.[8]

[fol. A-48] During the seven year period 1926-1932 there were 5,555 work stoppages involving 2,112,000 workers. During the seven year period 1933-1939 there were 17,862 work stoppages involving 8,262,000 workers; or more than three times as many strikes and strikers.[9] The establishment of union organization was the most frequent issue of strikes during that period.[10]

By 1939 there were 4 million members of the new unions in the Congress of Industrial Organizations.[11]

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[7] Denis W. Brogan, *The Era of Franklin D. Roosevelt* (Vol. 52, The Chronicles of America Series, Allan Nevins, Ed.) (Yale U. Press, New Haven, 1951) p. 10. Dealing with period about 1931-32.

[8] U.S. Bureau of the Census, *Statistical Abstract of the United States,* 1956, Washington, D.C., 1956, Table No. 271, p. 228.

[9] U.S. Bureau of the Census, *Historical Statistics of the United States, 1789-1945* (Washington, D.C. 1949) p. 73, D-224, 227.

[10] Ibid., D-232.

[11] Ibid., p. 72, D-222.

Basil Rauch, *The History of the New Deal*, 1933-1938 (Creative Age Press, N. Y., 1944), p. 160.

Old parties were changing and new political parties appeared to espouse the new ideas.

> Two young brothers who dared send their infant Progressive Party into battle against veteran Republican and Democratic forces commanded the Wisconsin political arena. The brothers, Robert and Philip F. LaFollette, held the two highest offices Wisconsin can bestow.[12]

That same year, in California, Upton Sinclair ran for governor on the EPIC (End Poverty in California) program, winning the nomination on the Democratic ticket, although repudiated by the regular Democratic Party leaders, and not being regarded as a Democrat, Sinclair's EPIC program, he explained:

> calls upon the State to rent farms and factories now idle, and permit the unemployed to operate with raw materials and machinery furnished by the State.[13]

1936:

In Minnesota, the Farmer-Labor Party, opposing both the Democrats and the Republicans, swept the top political posts. The Senate, after the 1936 elections, included 2 farmer-laborites and 1 progressive, besides one independent (Norris of Nebraska). The House of Representatives included 7 progressives and 5 farmer-laborites. Many candidates regarding themselves as of radical political designation got large votes or won on the Democratic Party ticket, notably in California, where the Progressive designation was frequent.[14]

In New York,

> "the newly formed American Labor Party . . . polled nearly 300,000 votes. Mayor LaGuardia, who voted

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[12] New York Times, November 8, 1934.

[13] New York Times, November 3, 1934.

[14] New York Times, November 5, 1936.

the Labor Party tickets on Tuesday is expected in party circles to be its candidate for re-election next November."

New York Times, Nov. 5, 1936.

[fol. A-49] The newly formed Union Party, with William Lemke as its Presidential candidate, was backed by Rev. Father Charles Coughlin, whose National Union for Social Justice once claimed 9 million members.[15]

Lemke obtained 882,479 votes.[16]

There were changes in the character of the Democratic Party, also during this period, especially the increased activities of the labor movement within it.

Mitchell, Broadus; *Depression Decade* (Vol. IX of The Economic History of the United States) (New York, Rinehart, 1947), pp. 301-302.

Rev. Charles Coughlin radio speech, reported in *New York Times*, Nov. 8, 1936.

Michigan was a prime center of the labor struggles and political ferment so characteristic of the time.

The characteristic achievement of the CIO was in organizing the automobile industry, which stood as the model of mass production, and employed almost entirely semi-skilled and unskilled workers, most of these drawn from small towns and rural districts. The industry had been virtually untouched by unionism; its reputation for good pay, owing to Henry Ford's influence, had its counterpart in assiduous anti-union institutions. The greatest single center of the industry—Detroit—was more completely than Pittsburgh and more studiedly than Los Angeles, the embodiment of the open-shop strategy . . . Automobiles, even more than steel, would be the best of prowess of the new industrial unionism.

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[15] New York Times, Nov. 8, 1936.

[16] *Information Please Almanac*, 1950, p. 131.

> 'Quickie' and 'sitdown' strikes broke out in the automobile industry in December 1936. . . . The result, in January 1937, was a concerted strike against General Motors. The sit-down was the chief weapon. . . . this novel union device brought General Motors, as others, to terms. After six weeks, Governor Frank Murphy of Michigan, who showed high intelligence and courage throughout, brought about a settlement that was a nearly unqualified victory for the workers and confirmed the CIO in self-confidence and in public respect for its power.[17]

The strike against General Motors:

> . . . expressed the pent up resentments of men in revolt against being de-humanized, against being only a badge, a number, a robot in thrall to a vast and intricate succubus of machinery, draining them of [fol. A-50] energy, threatening to cast them on the scrap heap after a few short years.[18]

In no other place, did President Roosevelt get such an enthusiastic reception as in Michigan. According to the New York Times account of his 1936 trip, he spoke before 100,000 persons crowded into Cadillac Square.

New York Times, October 16, 1936.

On the other side, Michigan was the home of one of the most potent anti-union vigilante-type organization, the Black Legion:

> Professional strikebreakers, local American Legion groups, the Ku Klux Klan, the Black Legion and a dozen or more secret or avowed anti-labor groups are available in many sections of the country to carry on this form of strike-breaking activity . . .

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[17] Broadus Mitchell, *Depression Decade* (Vol. IX of The Economic History of the United States) (New York, Rinehart, 1947), pp. 295-298.

[18] Herbert Harris, *American Labor*, Yale University Press, New Haven, 1939, pp. 268-269.

> The trials and investigations in the Black Legion murder cases showed that the Legion was an avowedly anti-union organization, had had a hand in breaking automobile unions and strikes in 1934, and was related to the espionage systems of large automobile manufacturing concerns.[19]

The political struggles of the period were very bitter.

> Denis W. Brogan, *The Era of Franklin D. Roosevelt* (Vol. 52 The Chronicles of America Series, Allan Nevins, Ed.) (Yale U. Press, New Haven, 1951) p. 197.
>
> Robert H. Jackson, *The Struggle for Judicial Supremacy*, Knopf, New York, 1941, pp. 214-216.

There was much use of name calling, and the tendency became more pronounced to call one's enemy a "fascist" or a "communist" depending on the political direction of the difference, rather than precision of definition.

The Secretary of the Interior, Harold L. Ickes, said in a speech in Detroit:

> The issue is Fascism or the America of the Founding Fathers. I say this fully conscious of the deliberate effort that is being made to cause us to believe that Communism constitutes the real threat to our liberties. As a matter of fact, it is the Fascist-minded men of America who are the real enemies of our institutions through their solidarity, their common interest in seizing more power and greater riches for themselves and their ability and willingness to turn the wealth of America against the welfare of America. It is these men who, pretending that they would save us from dreadful Communism, would super-impose upon our political institutions the equally dreadful Fascism.[20]

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[19] Robert R. Brooks, *When Labor Organizes*, Yale University Press, New Haven, 1937, p. 156, text and footnote.

[20] From speech of Hon. Harold L. Ickes, Secretary of Interior and Administrator of Public Works, before Detroit Town Hall, Detroit, Michigan, December 4, 1935.

Upton Sinclair, the EPIC candidate for Governor of California running on the Democratic ticket, charged that if his opponent won, a fascist state would be established. He also charged that the American Liberty League was a fascist organization.[21]

> [fol. A-51] New York Times, September 3, 1934.
> F. D. Roosevelt, Message to Congress, Apr. 29, 1938 in Senate Document No. 35, 77th Cong., First Session. *Final Report and Recommendations of the Temporary National Economic Committee,* p. 11.

On the other side, James A. Reed, former U. S. Senator from Missouri, addressed the Farmers' Grain Dealers Association of Illinois on February 11, 1936:

> I do not know what course others may pursue, but as for me I decline to be herd into socialistic, communistic, Bolshevistic corral, even though a Democratic banner is falsely hung above the gate.[22]

> *Campaign Letter,* printed, from the Democratic County Committee, 10th Assembly District, South, New York City.

The unions of the CIO were particularly subject to being called "communist" as a means of attack:

> Since, however, in the minds of many people the cry Communist is per se damaging, employers who hate unions and journalist who thrive on that hatred, along with some of the AFL's more irresponsible old-timers, have yelled Communist at the CIO for their own ulterior motives; in the hope, no doubt, that in accord with the advertising precept that 'repetition is reputation' they may injure their adversary.[23]

In New York municipal politics:

> Jeremiah T. Mahoney, speaking last night at the big Tammany rally of the campaign, linked Mayor La-

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[21] New York Times, September 3, 1934.
[22] *Vital Speeches,* 1936, p. 323.
[23] Harris, op. cit., p. 411.

> Guardia and Nikolai Lenin as stockholders in the Russian-American Industrial Corporation, which he declared was a communistic organization. Addressing a cheering throng at the Hippodrome, the Democratic mayoralty candidate cast aside all other issues and for the fourth consecutive night devoted himself to proving that a "red menace" threatens New York if Mayor LaGuardia is re-elected.[24]

Sometimes "Communist" and "Fascist" were used interchangeably in attacking one's enemies, as the then president of the United Automobile Workers, Homer Martin claimed in 1938:

> . . . the Communists are Fascists in every sense of the word.[25]

There were no incidents of actual violence carried out by Communists, but many incidents of violence directed against labor and poor people, often excused by the charge that those attacked were Communists.

> Mitchell, op. cit., p. 110.
> St. Louis Post-Dispatch, June 16, 1937.
> *Fortune*, January 1935.
> U. S. Senate, Subcommittee of Committee on Education and Labor, Seventy-Fifth Congress, *Hearings Pursuant to Sen. Res. 266* (LaFollette Committee Hearings), Part 6, Labor Espionage, General Motors Corporation, February 1937, appendix p. 2206.

[fol. A-52] In the 1930's the Communist Party was considered a legitimate political party. It participated in elections, its membership rapidly expanded.

> The membership of the Communist Party, as officially reported at its biennial conventions, rose from 14,000 in 1932 to 24,500 in 1934, 41,000 in 1936 and 75,000 in 1938.[26]

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[24] New York Times, October 29, 1937.

[25] New York Times, February 4, 1938.

[26] William Z. Foster, *History of the Communist Party of the United States* (International Publishers, N.Y., 1952) pp. 307, 380.

In 1936:

> A survey showed today that the Communist Presidential ticket will be represented on the ballots in at least thirty one States on election day, November 3.
>
> . . . In addition, Communists are contending for Governorships in at least eleven States, for Senatorships in six, and for election to the House of Representatives in sixty-four districts.[27]
>
> In Michigan Communist candidates appeared on the ballot for President, Governor and Senator. (besides local offices)[28]

In that campaign, Communist candidates spoke a number of times on nationwide hookups. Referring to a March broadcast on the Columbia network:

> Mr. Browder's speech marked the first instance in which a nationwide radio chain has granted free time for a political address by a representative of the Communist Party. The same time has been allotted tonight for a reply by Representative Hamilton Fish, Jr.
>
> There were protests by the National Americanization League:
>
> In reply to the protest, Columbia officials issued a statement pointing out that the Communist Party was listed officially as a political party in thirty-nine states and reiterating their policy of granting free time for the discussion of controversial public issues.[29]
>
> Large audiences responded to the Communist candidates.
>
> New York Times, November 3, 1936.

The Supreme Court, in the same year that it upheld the Wagner Act, overturned state criminal syndicalism and incitement to insurrection laws which had been used to

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[27] New York Times, October 17, 1936.

[28] Loc. cit.

[29] New York Times, March 6, 1936.

imprison alleged or actual Communist leaders in Oregon and Georgia (DeJonge and Herndon cases):

> . . . the decision's direct effect is to prevent interference with meetings under the auspices of the Communist Party or other radical organizations, unless violations of law occur at them.[30]

The Communist Party obtained wide support, and recognition of its legitimacy, because of its program emphasizing peaceful methods of change; opposition to fascism and support of democracy, and because of its participation in the efforts of labor to achieve organization and improve condi- [fol. A-53] tions. Its votes in elections, however, were lower because of the "united front" policy.

Rauch, op. cit., p. 244.

Brogan writes the following explanation of the rise in influence, legality, and respectability of the Communist Party, beginning with 1935:

> And in that year, the American Communist Party abandoned, with startling rapidity and admirable decision, its revolutionary program. It ceased to assail rival radical bodies as the worst betrayers of the workers and, willing to forget the past, offered cooperation on its own terms to Socialist leaders like Norman Thomas . . . The reversal was thorough enough. There was still a danger of an imperialist war, but it was not a war between rival and equally odious imperialisms, or a war of all the imperialists against the Soviet Union. What was threatened was a war of "Fascist Germany, Japan and Italy" against the Soviet Union and "the capitalist democracies of France, England, Czechoslovakia, Spain the United States." . . .
>
> By November, 1936, a powerful new emotional issue had given the Communist Party a more secure position in American life. The outbreak of the civil war in

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[30] American Civil Liberties Union, *Let Freedom Ring! The Story of Civil Liberty* 1936-1937 (New York, 1937) pamphlet, p. 16.

Spain and the open intervention of Nazi Germany and Fascist Italy alarmed millions of Americans . . . It was a young American Jew who later testified that he went to fight for the Spanish republic against the forces that were threatening his people everywhere. But there were hundreds of thousands of Gentiles who felt that their way of life was threatened, too, and who saw, in the volunteers of the Abraham Lincoln Brigade, the front-line defenders of democracy. And the Abraham Lincoln Brigade was mainly a Communist creation.

The depression had driven many members of the "intellectuals" out of the ivory towers they had inhabited in the twenties . . . The absence of any visible coherent economic philosophy in the New Deal, the shock to faith given by the long crisis of American capitalism, and the alleged immunity of the Soviet Union from the apparently fatal ailments of a declining capitalism, all made Communism seem more understandable and to some more attractive . . . by the time of the second Roosevelt election, the prestige of the Communist Party, its members, its resources and its hold on certain important sections of the labor movements made it a decidedly more important body than when the depression had first gripped the nation.

Its power was much greater than its open membership (never more than about one hundred thousand) would suggest. It had far more helpers, far more sympathizers, than it had members. And the zeal, energy, and lack of respect for conventional bourgeois ethical restrictions made the Communists much more formidable, much more to be feared, than their numbers apparently justified. No more than a great boss of the old days had needed to be a mayor or governor to rule his city or state did Communists need to be in positions of formal power to control a society or a labor union. Zealous liberals and union leaders, aware how much of the immediate effectiveness of their organizations was attributable to Communist industry, courage, and single-mindedness were not disposed to look the gift

horse in the mouth. This was especially true in the fast growing and understaffed Congress of Industrial Organizations, which was in desperate need of competent agents to organize the undisciplined masses pouring into the giant unions.[31]

[fol. A-54] The New York Times magazine section carried a feature article, an interview with Communist Presidential candidate Earl Browder, by F. Raymond Daniell. He wrote:

> The background of this leading Communist of the United States is both revolutionary and American.

And he quoted Browder as follows:

> It's possible that the reactionaries backing Landon may try to cancel the result of the election by force if they lose the election. There are open Fascists in the high command, you know. We may yet see the spectacle of the Communist Party in this country rallying to the defense of a Democratic government.
>
> New York Times, October 11, 1936, Magazine Section.

The American Civil Liberties Union wrote:

> It is said that the defenders of civil liberty condemn Fascism but do not equally condemn Communism. When the term "fascism" is used in such a sense, it is to describe the repressive measures characteristic of Facism, and shared by forces everywhere sympathetic with its objectives. If Communists engaged in such repressive tactics in the United States, we would condemn them equally. The record shows that American Communists do not. We use the words "Fascism" and "Communism" only in reference to American conditions.[32]

The attitude of the Communist towards force and violence was stated by Browder in answer to a question in a

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[31] Brogan, *op. cit.*, pp. 312-315.

[32] American Civil Liberties Union, op. cit., p. 15.

radio interview by Cedric W. Foster, Hartford newspaperman, in 1936:

> The Communist Party does not advocate force and violence. It is a legal party and it defends its legality. Communists are not conspirators, not terrorists, nor anarchists. The Communist Party is an open revolutionary party, continuing under modern conditions the revolutionary traditions of 1776.
>
> The Communists systematically advocate their revolutionary principles, that is, the necessity of socialism to replace the present capitalist system. But until that becomes a practical issue for the majority of the people, the Communists will join hands with all of those who fight for a better life under capitalism. The improvement of living conditions under capitalism may delay the revolutionary change to socialism, but it will provide a more peaceful, less difficult and less painful transition to socialism when the time comes.[33]

In the labor movement:

> [fol. A-55] Then, as is now commonly known, the Communists worked indefatigably, with no job being too menial or unimportant. They literally poured themselves completely into their assignments. The Communist Party gave its complete support to the CIO. . . . The fact is that the Communist Party made a major contribution in the organizatron of the unorganized for the CIO.[34]

While attacks on the legitimacy of the Communists continued, the general trend was for authoritative people in all categories to uphold the right of a man to be a Communist, and the rights of Communists to function as other citizens.

> During the 1936 campaign, certain stations of a National Broadcasting Company network failed to carry a speech by Browder. The American Civil Liberties

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[33] *Daily Worker*, October 7, 1936.

[34] Saul Alinsky, *John L. Lewis* (New York, 1949) p. 153.

Union complained to (Anning S. Prall) the Chairman of the Federal Communications Commission, charging that these were in violation of law "showing a tendency to discrimination against a minority political party.

New York Times, September 12, 1936, September 21, 1936.

In answer to a request by Marvin Goebel, managing editor of the Daily Kansan, student paper, the 1936 Republican Presidential candidate wrote:

"Freedom of speech must permit a man to say what he thinks, although we may not agree with his views.

I abhor Communism. It cannot permit the freedom, privileges and tolerance which we enjoy under a representative democracy, but if we are to have a democracy, we must not make the same mistake.[35]

New York Times, October 21, 1936.

Rev. R. A. McGowan, Asst. Dir. of Social Action, Dept. of National Catholic Welfare Council, testimony before Sub-committee of Committee on Education and Labor, U. S. Senate, April 21, 1936.

American Civil Liberties Union, op. cit. pp. 56-57.

In America the problem of civil liberty has become more than a theoretical defense of our constitutional rights. We are experiencing that denial of our elemental rights which is the sign of the presence of Fascist forces at work in our national life. "Oust the Reds" is the slogan. But the reality of the matter is that the wave of repression threatens to engulf liberals, progressives and radicals alike.[36]

Governor Lehman vetoes tonight the McNaboe bill which would have barred Communists and other radicals from the civil service and the teaching staffs of schools.

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[35] New York World Telegram, February 25, 1938.

[36] Council for Social Action, Congregational and Christian Churches of America, New Attacks Upon Liberties, Report issued February 3, 1936.

[fol. A-56] "Although I am unreservedly opposed to the principles of Communism, I am vetoing this bill in the interest of safeguarding American democracy" . . . The measure, he declared, would "abridge freedom of speech, freedom of thought, freedom of the press and freedom of assembly." [37]

A New York report in the New York Times:

Contrary to the action taken by the convention of the United Mine Workers in Washington, barring Communists, among others, from membership in the miners' organization, CIO affiliates here declared they would not exclude any one for political affiliation.

. . . Asked if CIO unions here would follow the mine workers' example, (CIO regional director Allan S.) Mr. Haywood indicated that the miners spoke only for themselves.

. . . Spokesmen of the Transport Workers Union and the National Maritime Workers Union, two of the largest CIO affiliates, expressed sharp disagreement with the position of the Mine Workers.

A statement by the Transport Workers . . . emphasized that the union had not barred Communists and would not do so. The statement pointed out that the union's constitution admits to membership all transport workers without regard to sex, race, color or religious or political belief or affiliation." [38]

At the convention of the United Mine Workers Union in 1937, Mr. Haywood referred to A.F. of L. president Green:

Who says we are Communists and that the CIO is run by a bunch of reds. Yes, we have Communists in the CIO. Nobody has said it is illegal to be a Com-

[37] New York Times, March 31, 1938.

[38] New York Times, February 3, 1938.

munist. But there are also non-communists, and Democrats, and Protestants, and all kinds of people.

We stand for the right of a man to belong to any organization politically that he chooses. We welcome them all as workers,[39]

Among the prominent CIO leaders who vigorously attacked "red-baiting" and attacks on the foreign born were John Brophy, Walter Reuther, James Carey, and Philip Murray, (as quoted in Richard O. Boyer and Herbert M. Morais, *Labor's Untold Story,* (Cameron Associates, New York, 1955) pp. 325-326.

"Why don't you dump your Communist leaders?" is a favorite poser. This is a demand which the CIO with the best will in the world, would find it impossible to meet, since it has never had a Communist leadership to dump. . . .

"If you aren't reds, why don't you red-bait?" is one to which the CIO might answer, "Because we weren't born yesterday". The red herring tactic is so ancient and obvious that it is insulting to expect such an experienced leadership as that of the CIO to fall for it.

Every forward step in the history of social progress has been greeted with charges similar to those now hurled against the CIO. Every trade union leader who has lifted a finger for the betterment of labor, every active unionist, has at one time or another been dubbed [fol. A-57] an agitator, Bolshevik or whatever else happened to be the favorite epithet of the time.

. . . The tactic of the red-herring is designed to divert attention from the real issue . . . American working people today are well aware that collective bargaining and the defense and extension of democracy are the real issues raised by the CIO.[40]

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[39] Allan Haywood, *Speech to United Rubber Workers Convention,* 1937.

[40] Congress of Industrial Organizations, *Union News Service,* August 30, 1937, Editorial.

The acceptance of Communists and those so charged was most pronounced among the rank-and-file of the people fighting against poor conditions.

Brogan, op. cit., pp. 169-170.

Ibid., p. 278.

[fol. A-58] APPENDIX F—A. DOCUMENTATION OF THE POLITICAL CLIMATE OF THE 1950's

By the 1950's the cold war and McCarthyism had completely changed the political climate of the 30's.

> Everywhere in the United States, the fury against Communism was taking on . . . elements of a vendetta against the Half Century of Revolution in domestic affairs, against all departures from tradition in foreign policy, against the new, the adventurous, the questing in any field.[1]

> The whole postwar accent is on something called "un-American", a hyphenated synonym for unorthodoxy.[2]

> The tradition of the American citizen is a proud one. As Elmer Davis reminds us, he was born free. He was sovereign. He called no one master. He need stand abuse from no one. He was entitled to say "L'etat, C'est moi!" But today that is changed. His government approaches him not as his agent and creature, but aloof, hostile, suspicious.[3]

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[1] Eric F. Goldman, *The Crucial Decade; America, 1945-1955.* (New York, Knopf, 1956), p. 213.

[2] Allan Barth, *The Loyalty of Free Men.* (New York, Viking, 1951), p. 7.

[3] Dean Acheson, *A Democrat Looks at His Party.* (New York, Harper; 1955) pp. 123-124. Mr. Acheson quotes (pp. 127-28) an apposite statement from President Truman's veto message of September 22, 1950, on the Internal Security Act of 1950: "And what kind of effect would these provisions have on the normal expression of political views? Obviously, if this law were on the

Instead of free, open discussion and debate, instead of a free flow of political, social and economic ideas into the public market place, fear, imagined and real, brought conformity into every facet of American life.

> Our whole interpretation of loyalty has become a negative and frightened one, we defined loyalty by reference to something called "un-Americanism". And by that we mean non-conformity. Gone is the grand confidence of the time when we believed that men would be loyal to America simply because the American promise would inspire loyalty in all who were given a chance to share it. Now we rely on ritual professions of loyalty, we suspect diversity and unorthodoxy, we [fol. A-59] build a massive administrative system to assure us that our schools, factories, and government are not riddled by subversives.[4]
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> Henry Steele Commager, *Freedom, Loyalty, Dissent.* (New York, Oxford University Press, 1954) pp. 141-142.

It was estimated that approximately 12,600,000 employees, or one out of every five employees, were covered by some form of loyalty or security test.

> *"Loyalty-Security Measures and Employment Opportunities,"* Ralph S. Brown, Jr., Professor, Yale Law School, Bulletin of the Atomic Scientists, Vol. IX, No. 4 April 1955—Special issue on "Secrecy, Security and Loyalty".

The Soviet Union was regarded as an immediate military threat and American Communists were regarded as domestic agents of the foreign enemy.

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statute book, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

[4] John H. Schaar, *Loyalty in America.* (Berkeley, University of California Press, 1957) p. 178.

The debate about Communists in government had long since reached an unprofitable stage, if, indeed, it had ever been more than the "red herring" President Truman had once called it. It had grown like a parasite, however, on the obsessive dread lest the atomic weapon should "fall into Communist hands"—meaning those of the Soviet Union.

Sanctions were now being seized and administered by every sort of public or private official. The search for victims had really begun, in principle, to follow the pattern of revolutionary French terror. To be denounced was to be condemned. To be suspected was to lose position, opportunity, and even the claim to employment.[5]

Samuel A. Stouffer, *Communism, Conformity and Civil Liberties; A Cross Section of the Nation Speaks Its Mind.* (New York, Doubleday, 1955), p. 156.

When the United States and Rusia were allies during the war and the danger of Communist subversion was generally regarded as small, tolerance, even in wartime, of such groups as Socialists and support for unlimited free speech and a free press were at a fairly high level.

But as Russian hostility became more apparent after the war, and as surveys showed more and more people concerned with Communist subversion of America, there was growing support for restrictions and sanctions not only against Communists but also against many other groups or individuals who failed to conform to popular opinions.[6]

The Communist Party was hounded by legal and extralegal sanctions; it was declared a criminal conspiracy by legislation and by court decision.

Zachariah Chafee, Jr., *The Blessings of Liberty,* (Philadelphia, Lippincott, 1956), p. 22.

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[5] Rexford G. Tugwell, *A Chronicle of Jeopardy, 1945-1955.* (Chicago-University of Chicago Press, 1955), pp. 420-421.

[6] Ibid., p. 216.

[fol. A-60] FEDERAL LAWS AND ADMINISTRATIVE AND EXECUTIVE ORDERS DIRECTED AGAINST COMMUNISTS

Internal Security Act of 1950—50 USC 781 et seq.; 50 USCA, par. 781.

Communist Control Act of 1954—50 USC (1955 Supp.) par. 841; 50 USCA, par. 841.

Section 9 (h) (Taft Hartley Act); Labor Management Relations Act (1947); 61 Stat. 146 29 USC; par. 159 (h).

Loyalty of Employes

Federal Security and Loyalty Program

Beginning with Truman's Executive Order 9835 of March 21, 1947 (12 Fed. Reg. 1935)

Extended by Eisenhower's Executive Order 10450 of April 27, 1953, (18 Fed. Reg. 2489)

Attorney General's List, issued by Attorney General pursuant to Executive Order. First list published in March 20, 1948 (13 Fed. Reg. 1471). Thereafter extended.

Security Clearance of Employees working on defense contracts; 18 Fed. Reg. 6538 (1953)

Security of Vessels and Waterfront Facilities—

Magnusson Act of August 9, 1950; 64 Stat. 427

Regulations pursuant to Executive Order 10173, October 18, 1950.

Deportation and Denaturalization—

Subversive exclusion statute; 8 USC., par. 137 (1946)

Immigration and Nationality Act of 1952; 66 Stat. 166, 8 USCA par. 1101

Passports—

Immigration and Nationality Act of 1952; 66 Stat. 190; 8 USCA par. 1185, Sec. 215

Regulations 17 Fed. Reg. 8013 (1952)

For a list of state statutes and municipal ordinances, including those adopted during this period, see:

Digest of the Public Record of Communism in the United States, published by the Fund for the Republic, Inc., 1955, pages 241-487.

SIMILAR LAWS ADOPTED IN MICHIGAN DURING THIS PERIOD

Punishment of subversion by life imprisonment; Public Acts 1951, No. 138, CL 1948, par. 750.545, Sec. 28.813, et seq. MSA.

Constitutional Amendment, Art. II, Sec. 22 of Constitution of 1908—defining subversion and making it a crime; providing that the rights of free speech and press "shall not be valid as a defense in any trial for subversion". Adopted at General Election of November 7, 1950.

Michigan Communist Control Law, 1952—Act 117, 1952, p. 132; Sec. 28.243 (11-22) MSA.

Act 38, 1950 (Ex. Sess.), p. 121; Sec. 28.243 (1-5); Punishing advocacy of overthrow of government.

Act 270, 1947, p. 418, June 27; Sec. 18.58 (1-7) MSA—Act to regulate and control the operation of foreign agencies. Defined among other things as anyone "serving directly or indirectly the purposes, aims or objectives of a foreign power".

[fol. A-61] Its officers were jailed and its members suffered economic and social outlawry.

Zachariah Chafee, Jr., *The Blessings of Liberty*, (Philadelphia, Lippincott, 1956)., pp. 123-124.

The taint of Communism was widened to include anyone in any way connected with the Communist Party or its members and even those who simply refused to openly condemn them.

Acheson, op. cit., p. 142.

A study of the decade from 1940 to 1950 reveals a general acceptance of the use of guilt by association as a method of policing ideas deemed to be objectionable . . .

In the new and simplified world all is black and white, loyal or disloyal, one hundred per cent American or dirty Communist. The classification is, in practical effect, between the orthodox and heterodox, dividing

> those who accept the prevailing community definition of Americanism from those who insist on personal choice in matters of political faith.[7]

The investigation committee, the loyalty and security programs, the Department of Justice, grand juries, administrative agencies, local boards and commissions, private organizations, industries and even unions moved to impose sanctions on the Communist Party, its members, and its supporters through loss of jobs, social degradation, blacklisting and jail.

> The secret investigation is a first step from which other proceedings may follow. Charges may be made by the government resulting in the destruction of a citizen's good name and all that goes with it by labeling him as of doubtful loyalty or a risk to the security of the nation, on the basis of evidence of which he is not told, received from persons whom he is not allowed to confront, and of which only an anonymous summary is given to his judges.[8]
>
> Chafee, *op. cit.*, pp. 83-84.

Informers, paid in money, prestige or public rehabilitation, were not only socially accepted but were often treated as patriots and heroes. Those believed to be in a position to give information on the "communist conspiracy" were separated into the "sheep" and the "goats". There was no middle or neutral position. And to obtain absolution they had to name names and utter the words which would support the assumption underlying the witch hunt.

> Chafee, *op. cit.*, pp. 95-97.

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[7] Francis Biddle, *The Fear of Freedom*. (New York, Doubleday, 1951), pp. 90-91.

[8] Acheson, op. cit., p. 126.

BRIEF FOR THE UNITED STATES

Office - Supreme Court, U.S.
JAN 10 1958
JOHN T. FEY, Clerk

No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1957

STANISLAW NOWAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
J. F. BISHOP,
CARL H. IMLAY,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 72

STANISLAW NOWAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (App. 52–54)[1] is reported at 238 F. 2d 282. The opinion of the District Court (R. 47–55; App. 24–35) is reported at 133 F. Supp. 191.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1956 (App. 49). The petition for a

[1] The pagination of the record in the Court of Appeals is designated by the symbol "App."; the unprinted record in this Court by the symbol "R."; and the transcript of the trial proceedings by the symbol "Tr.". Where a differentiation is made between the record in this case, and the record in petitioner Maisenberg's case in No. 76, the additional symbols "N" and "M" will be employed respectively.

writ of certiorari was filed on January 30, 1957, and was granted April 1, 1957. 353 U. S. 922. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The questions common to this case, No. 72, and the companion *Maisenberg* case, No. 76, are:

1. Whether affidavits by an attorney of the Immigration and Naturalization Service, based upon analysis of the Service's records, sufficiently show "good cause" for the institution of denaturalization proceedings.

2. Whether the knowing giving of false answers as to membership in an organization advocating the overthrow of the United States Government (the Communist Party), in connection with naturalization proceedings in 1937–1938, constituted a fraud on the naturalization court under the facts of these cases.

3. Whether denaturalization on the ground of false swearing as to membership in such an organization teaching or advocating the overthrow of the United States Government is violative of First Amendment rights.

4. Whether the unrebutted evidence of the government as to the elements of the false swearing is clear, convincing, and unequivocal.

In addition, petitioner Nowak, in No. 72, raises the following questions peculiar to his own case:

5. Whether a certificate of citizenship granted by a naturalization court in 1938 can be challenged in denaturalization proceedings, brought under Section

338 (a) of the Nationality Act of 1940, on the basis that the petitioner had not in fact behaved, prior to his naturalization, as a person attached to the principles of the Constitution.

6. Whether the District Court erroneously denied petitioner access to a prior statement of one witness and the grand jury testimony of another, and whether this issue is, in any event, properly before this Court for review.

STATUTES INVOLVED

The pertinent statutes provide as follows:—

1. The Nationality Act of 1906, as amended, Section 4, paragraph 4 (34 Stat. 596, as amended, 8 U. S. C. (1934 ed.) 382):

> No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. * * *

Section 7 (34 Stat. 598, 8 U. S. C. (1934 ed.) 364:

> No person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization

entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States. *

Section 15 (34 Stat. 601, as amended, 8 U. S. C. (1934 ed.) 405) (replaced in 1940 by Section 338 (a) of the Nationality Act of 1940):

> It shall be the duty of the United States district attorneys for the respective districts, or the Commissioner of Immigration and Naturalization or Deputy Commissioner of Immigration and Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate was illegally procured. * * *

2. Section 338 (a) of the Nationality Act of 1940 (54 Stat. 1158, 8 U. S. C. (1940 ed.) 738 (a)) (replaced by Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260):

> It shall be the duty of the United States district attorneys for the respective districts,

upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

3. Section 340 (a), Immigration and Nationality Act of 1952 (66 Stat. 260; 8 U. S. C. 1451 (a)):

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *

4. The Act of October 16, 1918 (40 Stat. 1012, as amended, 8 U. S. C. (1934 ed.) 137):

SECTION 1. That the following aliens shall be excluded from admission into the United States:

* * * * *

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law; * * *.

* * * * *

SECTION 2. That any alien who, at any time after entering the United States, is found to have been at the time of entering, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *.[2]

[2] Pertinent regulations of the Immigration and Naturalization Service are set forth in the text of the Argument, *infra*.

STATEMENT

Petitioner emigrated to the United States from Poland in 1913 and was admitted to United States citizenship by a decree entered by the United States District Court for the Eastern District of Michigan on June 13, 1938 (App. 2, 15). On December 23, 1952, the United States Attorney filed a complaint in the same court (pursuant to Section 338 (a) of the Nationality Act of 1940, *supra*, pp. 4–5) alleging that such citizenship had been illegally and fraudulently procured and praying that the decree of naturalization be set aside (App. 2–7; R. 5–8, 20–23). The complaint, as amended, alleged (1) that in his preliminary naturalization hearing on December 15, 1937, petitioner was asked and falsely denied membership in the Communist Party; (2) that petitioner answered falsely Question 28 in his Preliminary Form for Petition for Naturalization, filed on or about July 19, 1937, which asked, "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?", and to which he replied in the negative; (3) that in his Petition for Naturalization, filed on December 15, 1937, petitioner falsely swore, *inter alia*, that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and (4) that he made a false oath of allegiance in open court on June 13, 1938—whereas in fact he had been a member of the Communist Party from 1935 until 1938, and knew that the Party advocated the violent overthrow of the government of

the United States. It was alleged that petitioner gave the false testimony and concealed the material facts to induce the Immigration and Naturalization Service to recommend the granting of the petition (App. 2–7, 13–14; R. 5–8, 20–23).

Attached to the complaint was an affidavit by an attorney of the Immigration and Naturalization Service, who stated that, from his examination of the records of the Service, it appeared that in the prenaturalization proceedings petitioner had alleged that he was attached to the principles of the Constitution of the United States, that he did not belong to any organization which taught or advocated the overthrow of the existing government, and that he was not and never had been a member of the Communist Party; but that petitioner's allegations were in fact false in that he had become an active member of the Communist Party in 1935 and continued such membership to the date of the complaint; and that petitioner and the Communist Party advocated the violent overthrow of the United States Government and circulated literature to that effect (App. 7–12; R. 9–12).[3]

1. At the trial, government witness Hart (who had acted as petitioner's preliminary examiner (Tr. 43–44)), and Smiley (who had acted as petitioner's designated naturalization examiner), both testified that they had an independent recollection of having examined petitioner (Tr. 46, 120, 129–130, 149–151). Each remembered asking petitioner, in accordance with their usual practice of inquiring into the loyalty,

[3] The full text of the affidavit is set forth in the Appendix, *infra*, pp. 129–133.

character and fitness of the applicant for citizenship, whether the answers to the various questions asked on his Preliminary Form A–2214 for a Petition for Naturalization were true, and in each instance petitioner reaffirmed his answers given on that form (Tr. 44–45, 52–54, 121–123, 127–128). This form, which was introduced in evidence on the trial (Tr. 37–39), indicates that petitioner answered "No" to Question 28 which read (App. 18–19):

> Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?

Hart remembered reexamining petitioner as to the truth of his answer to this particular question and remembered that he repeated his original negative answer (Tr. 53–54). Smiley recalled that petitioner repeated all of the answers on the form and answered in the affirmative when asked "whether or not he was attached to the principles of this government or believed in the government of the United States" (Tr. 121–123, 127–128), and in the negative when asked "whether he belonged to any organizations that were opposed to our form of government" (Tr. 121–123, 128).

In addition to these questions directed to the notations on the form, both examiners testified that they asked petitioner whether he had ever been a member of the Communist Party, and that he said "no" (Tr. 56–57, 122, 128). Hart explained that the examiners did not necessarily confine their oral questions to the entries on the Preliminary Form (Tr. 103–104) and

began to ask the applicants about Communist Party membership in late 1936 or early 1937 at the time of the first "sit-down" strikes (Tr. 108–109). Hart also said that he was disturbed about that situation at the time and the fact that the unions had been infiltrated by the Communist Party; and, since petitioner was an official in the union involved, Hart asked him whether he was or whether he had ever been a member of the Communist Party; petitioner said that he had not been (Tr. 56–57, 87–89, 99–100, 110–111). Although Hart made a note of petitioner's activities in connection with the "sit-down" strike in the American Aluminum plant and his arrest in connection therewith (App. 23; Tr. 110), he made no notation as to petitioner's denial of Communist Party membership since, he said, such notation was made only when the answer to the membership question was in the affirmative (Tr. 99). Hart testified that he remembered asking the membership question despite the lack of a specific notation (Tr. 68–69, 82–83).

Smiley also remembered asking petitioner whether he was then or ever had been a member of the Communist Party, and that petitioner said "No" (Tr. 122, 128). Smiley said he had an independent recollection of this because of petitioner's then current notoriety (Tr. 130, 149–151), and because someone had that morning pointed petitioner out to him in the office, and had made a claim that petitioner was a Communist (Tr. 132–133, 152). Smiley testified that he did not record petitioner's denial of membership, because he made notations only where they raised a material problem (Tr. 159–160, 161).

2. Uncontradicted testimony of witnesses acquainted with petitioner's Communist Party membership, as found by the District Court, may be summarized as follows:

(*a*). Government witness Louis Budenz testified that he joined the Communist Party in August 1935, and that he retained his membership until October 10, 1945 (Tr. 960, 978). Soon after joining the Party, Budenz joined the staff of the Daily Worker, the official organ of the Communist Party, as a staff member. In late 1935 or early 1936, he became its labor editor, and later he became its managing editor. He was also a member of the National Committee of the Communist Party and held various other offices in committees and commissions of the Party. As editor of the Daily Worker, he published directives to Communists throughout the country under the supervision of the Politburo or National Board of the Communist Party, which, like the Daily Worker, had its offices in Communist Party headquarters in New York City (Tr. 961–963).

In November 1937, Budenz organized a Communist paper, the Midwest Daily Record, in Chicago, which was published from February 1938 until January 1940 (Tr. 1000). In connection with this activity, Budenz attended a closed Communist Party meeting of Party functionaries in Chicago in late 1937 or the first part of 1938 to discuss the new publication of which Budenz had become editor. Jack Stachel, then the most important member of the Politburo of the National Party, introduced petitioner Nowak to Budenz as a valuable member of the Party (Tr. 964–967).

The district organizer of the Michigan District of the Communist Party, William Weinstone, also attended this meeting (Tr. 965–966).

Budenz likewise attended at least two District Bureau meetings in 1938 and 1939 in the Communist Party headquarters in Detroit, Michigan, with petitioner Nowak. The subject of discussion at these meetings was the infiltration of the United Automobile Workers by the Communists, and the necessity of cooperating with the Midwest Daily Record in extending its circulation, and obtaining news items which would make it a serviceable organ in Michigan (Tr. 967–968). Another closed meeting in 1938 was held in a member's apartment in Detroit. This meeting was attended by petitioner Nowak, William Gichert, Nat Ganley, and others, to discuss the infiltration by the Communists of the automobile plants in Detroit (Tr. 971–972).

Budenz testified that he saw petitioner Nowak at several meetings of the National Committee of the Communist Party in Communist Party Headquarters in New York in the latter part of 1938 or early 1939, and at least two in 1943 or 1944. These meetings were attended only by important functionaries of the Party, including the members of the National Committee (Tr. 970–971, 976). Budenz also described a meeting attended by petitioner Nowak and others in the mid-1940's in the Politburo offices in the Communist Headquarters in New York where those attending discussed the role of the Communist Party in the war (Tr. 977–978).

(*b*) Government witness Fountain testified that he joined the Communist Party in May 1937 in Detroit

and became the unit organizer of his Communist unit in a branch of the Chevrolet plant there, holding that office until he left the Party in December 1938. He also wrote on labor activities for the Midwest Daily Record, edited by Budenz (Tr. 640–641, 667, 673). In June 1937, he saw Nowak at a closed fraction meeting of Communist Party members who were also union delegates at a UAW–CIO convention in Detroit. William Giebert, a representative of the National Committee sent to Detroit to build the Party in the automotive industry, gave a speech urging the building up of the Communist Party within the CIO "on behalf of the extension of the Soviet system around the world" (Tr. 647–649).

In the summer months of 1937, Fountain attended a school for new Party recruits which was conducted by the Communist Party under the supervision of petitioner Maisenberg (in No. 76), then a section organizer. The classes were taught by John P. Davis of the National Negro Congress, Roy Hudson, who was connected with the maritime industries, and petitioner Nowak. Nowak lectured on the then current strategy of cooperation with other organizations resisting Fascism which had been adopted by the Communist International, and which was being employed in Spain, France, and the United States. Petitioner Maisenberg introduced Nowak as an expert on the activities of Communists in the labor movement (Tr. 653). He discussed the role of trade unionists and Communists in trying to carry out this policy (Tr. 651–654, 674–677). He said that (Tr. 664) "the goal of all this activity was to extend the Soviet system

around the face of the earth." He said that if the Communist Party could not gain control of the unions through union elections (Tr. 665), "then it may be necessary to use violence to get it, to win control for the Communist Party and the Communist System."

In the fall of 1937, Fountain attended meetings with Nowak in Communist Headquarters in Detroit where Earl Browder and William Z. Foster of the National Committee were the speakers (Tr. 655–656, 659, 660). Fountain saw Nowak in almost daily meetings of Communists who were union delegates to a UAW–CIO convention in Milwaukee in August 1937, held to coordinate the Communist activities within that union. District organizer Weinstone and Giebert of the National Committee attended these meetings where Nowak gave speeches concerning the pending struggle for control of the union (Tr. 656–658). Nowak also attended sessions of a statewide Communist Convention at the Finnish Hall (Communist headquarters) in Detroit which were restricted to delegates elected by the units and sections, and functionaries of the state and national Communist groups (Tr. 660–661). Nowak spoke on the necessity of recruiting new members and building up the Communist Party in the unions (Tr. 662–663). Fountain saw Nowak also at a number of meetings of Communist union delegates to the Michigan State CIO Council in Lansing, Michigan, in April 1938. At one of these meetings, the district organizer of the Communist Party, Weinstone, instructed the Party members who were also union delegates that they should switch their allegiance

from one labor leader to another and that they were to influence other delegates in this respect (Tr. 706–707).

(*e*) Government witness Eager testified that he joined the Ternstedt unit of the Communist Party in March 1937 after being solicited by petitioner Nowak to become a member. Nowak at the time was the UAW organizer in Eager's shop and recommended him as a good prospect for Communist Party membership since Eager was active in his union local (Tr. 307–311). The Ternstedt Communist unit was largely comprised of members who were union members and leaders (Tr. 374). Eager was accepted by the unit on Nowak's recommendation (Tr. 322) and thereafter attended about 30 closed meetings of that unit with him (Tr. 311–314, 322). At these meetings, Eager saw Nowak pay Communist Party dues to the financial secretary who gave him stamps which he pasted in his Party membership book as a receipt for payment (Tr. 312–315). Nowak spoke at some of these meetings (Tr. 328). At one of these closed unit meetings, restricted to chief stewards and head committeemen of the union who were also Party members, Nowak outlined what Party members should do in the automotive plant, and suggested that Party members be more aggressive. Nowak also stated that the Party could not rely entirely on ballots in this country—that it was only by a militant Communist leadership in the shops, stores, factories and mines "that we could expect to have a Soviet America" (Tr. 315–316, 321, 331). Nowak also told Eager, about this time (Tr. 324), "that it was only by an

aggressive Communist Party leadership in the unions that we could get the mass of the workers in back of that leadership, and whenever the revolution would come for a Soviet America that then we would have the people, the workers, at our back." At another meeting of the Ternstedt Communist unit, Nowak stated (Tr. 379), "that we couldn't depend too much on the ballot to gain our objectives but that it would eventually resolve to bullets, and it was only by the same militancy of the workers in the plants that we, as leaders, would be able to establish a Soviet America".

(*d*) Government witness Nowell testified that he joined the Communist Party in June 1929 and remained a member up to the end of 1936 (Tr. 395), serving during this time as a member of the Michigan District Bureau of the Communist Party and in other Party posts as a full-time paid functionary (on Nowell, see also *infra*, pp. 21–25). Nowell first met petitioner Nowak in 1929 or early in 1930 at the headquarters of the Proletarian Party in Detroit (Tr. 440). At that time, Nowak was a member of that party and the educational director of its Michigan Section (Tr. 442, 464).[4] Nowell was appointed to a committee of the Communist Party by district organizer Jack Stachel to reach a united front agreement with the Proletarian Party, and he had three meetings at the headquarters of that party to bring this about (Tr. 440–451, 459–460, 462–466). As a result of this rela-

[4] Nowak's activities in the Proletarian Party in the early 1930's were described by government witness Soeters (Tr. 526, 536–537, 554–556).

tionship, the Communist Party ultimately took over the Proletarian Party and enlisted its members, including petitioner Nowak (Tr. 452–453). Nowell testified that he attended a closed meeting of functionaries of the Michigan District called by the district organizer, William Weinstone, in the late summer or early fall of 1935 (Tr. 454). About 25 persons attended this meeting in the Finnish Hall (the Communist Party headquarters), including petitioners Nowak and Maisenberg (Tr. 455), and Nowell, who attended as a director of a city-wide Communist Party fraction seeking to infiltrate various organizations (Tr. 458). District organizer Weinstone announced that Nowak had that day become a member of the Communist Party (Tr. 455–457). Nowak gave a speech in which he stated that the Proletarian Party could not satisfy the needs of the working class, and that he agreed with the Communist Party and the Communist International that it would be necessary to "destroy" capitalism in order to set up a government of the workers. He pledged his allegiance to the leadership, program and policies of the Communist Party and the International (Tr. 457). Following Nowak's initiation into the Party at this meeting, Nowell saw him on two other occasions in district organizer Weinstone's office (Tr. 458). Weinstone told Nowell on one occasion in the spring of 1936 that petitioner Nowak's membership would not be made public but that he was going to function as a "mass leader" of the Communist Party (Tr. 484–485, 496).

(*e*) Government witness Hewitt joined the Communist Party at the University of Chicago in late

1936 or early 1937 (Tr. 558–560). In September 1938, he went to Michigan State College in East Lansing, Michigan, as an instructor. While there, he was instructed by the Communist Party to go to Detroit and reestablish contact with the Party through petitioner Nowak. In Detroit, he met Nowak at his apartment and discussed the possibility of establishing a Communist unit at Michigan State College to act as a fraction or Communist auxiliary of a local of the American Federation of Teachers (Tr. 562–567). At this meeting, Hewitt paid Nowak the arrearages of dues which he owed the Party, and Nowak gave him receipt stamps to paste in his Party book (Tr. 567). Hewitt then returned to East Lansing, and organized the Communist Party unit there. Nowak, who was a Communist member at large, became attached to this unit as a convenience, and attended its organizational meeting in the spring of 1939 as a "paper member" of the unit (Tr. 568–570).

Nowak paid his party dues to the unit on this occasion and Hewitt gave him stamps to put in his Party book (Tr. 571). Nowak, who was then a Michigan State senator and a secret Communist, informed the unit that he would not be their contact man, and that while Hewitt could come to him for advice, they, as a Communist unit, would have to handle their affairs through a section (Tr. 573, 574).

(*f*) Government witness Reno testified that he joined the Communist Party in January 1931 and remained a member until April 1942, during which time he held numerous offices in the section and district levels of the Party as a paid functionary (Tr. 1033–

1035). He remembered seeing petitioner Nowak at a closed Communist Party fraction meeting in July or August 1937, in Milwaukee, Wisconsin, held in conjunction with a convention of the United Automobile Workers (Tr. 1036–1037, 1043). This meeting was also attended by district functionaries William Weinstone and Nat Ganley, and the Communists discussed the position of the Party in relation to union elections (Tr. 1038–1041). Reno saw Nowak at other fraction meetings in Milwaukee in October or November 1937 and 1938 (Tr. 1037, 1045–1046). Nowak was a member at large, responsible only to the district office or the National Committee. Reno remembered one occasion when petitioner paid his dues to district organizer Weinstone and Reno gave him stamps in return which he placed in his Party book (Tr. 1059–1060, 1107–1112, 1125, 1127).

About the first week in December 1938, after Nowak had been elected a Michigan State senator, Reno saw him at a closed meeting of the National Committee in New York attended by 200 or 250 persons including Earl Browder, William Z. Foster, Roy Hudson, Jack Johnstone, and representatives of the Michigan district, who met to discuss the 1938 elections and the activities of the Communist Party in 1939 (Tr. 1046–1047, 1051–1052). Following this meeting, he saw Nowak again at a meeting of Michigan delegates with the National Committee to discuss the assignment of Communist functionaries in the Michigan District of the Communist Party (Tr. 1053–1054).

(*g*) Government witness Rataj joined the Communist Party in late 1936 and remained a member until

the early fall of 1938 (Tr. 184), serving as a delegate to the Hamtramck, Michigan, section of the Communist Party (Tr. 184–185). Rataj had known petitioner Nowak in 1925 and 1926 in connection with Proletarian Party activities, and on joining the Communist Party in 1936 saw him on several occasions at Yemans Hall, a Communist hall where Communist section meetings were held (Tr. 186). Rataj attended a closed meeting with Nowak and the leaders of the Communist Party of Michigan in the Finnish Hall, the state Communist headquarters (Tr. 198–199, 208, 211, 252–253). William Z. Foster of the National Central Committee attended in order to receive a report on the Communist membership drive then in progress. During the meeting, Nowak was called on to give a report as to how many new members he had enlisted, and when he had none to report the district officers criticized him. Nowak, in response, pointed out that the West Side union local, of which he was the Communist Party representative, had a stronger Communist membership than the other union locals (Tr. 203–206).

(*h*) Government witness Herbster testified that she joined the Communist Party early in 1937 and remained a member about a year and a half, serving in a Communist unit of employees of the Health Survey, a project of the W. P. A. (Tr. 277). Aside from 6 or 7 open meetings at which she saw petitioner Nowak (Tr. 278–279), she also saw him in the summer of 1937 at one closed state-wide Communist meeting which was attended by the district officers, and the chairman of the National Central Committee, Earl

Browder (Tr. 279–282, 292–294). District organizer Weinstone and Browder spoke about organization and policies of the Party. Weinstone reprimanded Nowak for not enlisting more Communist members as the organizer for the West Side union local, and Nowak, in defense, said that he had not brought in more because he had been severely criticized regarding the type of members that he brought in in the past (Tr. 282, 297).

3. In addition to the foregoing, evidence was adduced by the government as to the aims and purposes of the Communist Party during the relevant periods, as follows:

(*a*) Witness Nowell (*supra*, pp. 16–17) became a member of the Michigan District Bureau of the Communist Party after joining in 1929, and at the same time was director of the District bookstore, circulation manager of the Daily Worker, and a director of the District Commission on Negro Problems (Tr. 395, 396, 413, 434). As director of the bookstore, he ordered Communist literature for circulation to the units on the recommendation of the National Agitation and Propaganda Commission of the Central Committee (Tr. 414). In 1930, he attended the District Communist School in Detroit where he studied Marxism-Leninism, Marxian Economics and Trade Union and Strike Strategy, under district organizer Jack Stachel and other instructors (Tr. 398–401).

Following his studies at the Detroit School, Nowell was selected by the Central Committee to attend the International Lenin School (the Lenin Institute) in the Soviet Union, where he studied in 1931 and 1932.

The Central Committee paid for his trip to Russia, and while at the school he was maintained by the Russian government and the Communist International (Tr. 401). Before departing, the American contingent of about forty students was told by Earl Browder that this school was "devoted to training professional revolutionaries for leadership for all sections of the Communist International", that they were expected to make the best use of their time there, "and to return to the United States and lead the revolutionary movement" (Tr. 410). At the Lenin School, approximately 1,500 students from 26 countries (Tr. 433) studied under Russian instructors, Red Army officers, members of the O. G. P. U. and others, including one American Communist teacher (Tr. 403–404). The students studied the Communist classics, Marxian Economics, Fundamentals of Marxism-Leninism, History of the Canons and Structure of the Communist International, History of the International Labor Movement, Trade Unionism and Strike Strategy, International Propaganda, History of the Communist Party of the United States, and the Science of Civil Warfare (Tr. 404–405). In Marxian Economics, they were taught the necessity for and the eventual means of overthrowing the capitalistic system and establishing the dictatorship of the proletariat (Tr. 406). In Trade Union and Strike Strategy, they studied the structure of the Red International Labor Union, including such subjects as how to organize Communist groups within shops, how to lead strikes and to develop them into general strikes and eventually into rebellion and civil war for the overthrow

of the capitalistic system and the establishment of Communism (Tr. 406). In the Science of Civil Warfare, they were taught the military tactics of waging a civil war for the purpose of overthrowing the American government by officers of the Red Army. The latter course included instruction in the use of arms, sabotage, guerilla warfare, and other military subjects (Tr. 407–409).

The instructors told the students that the Communist Party of the United States was a section of the Communist International and was bound by its decisions, that its directives were a guide to the revolution in the United States which would be patterned on that of the Russian Revolution (Tr. 410–411). They were taught that the ultimate objectives of the Communist Party "were to overthrow the government of the United States" and "establish the dictatorship of the proletariat fashioned after the Soviet system in Russia" (Tr. 411; and see Tr. 426–427, 433). The American students were told in great detail how to apply these subjects in the United States, and instructors and members of the Executive Committee of the Communist International spoke on the political and economic systems of the United States (Tr. 409).

On his return to the United States, Nowell became the Director of Education for the Michigan District, Director of the Communist District Workers' School, and an instructor in that school (Tr. 396, 413). As director of the school, he worked with the Organizational Secretary in selecting students and in assigning them on completion of their studies (Tr. 414–415). At the school he taught what he had learned at the Lenin School, what he was directed to teach in this

tives sent him by the Central Committee through the district organizer, and also the resolutions, theses, and reports of the Central Committee and the Communist International. The basic Communist "classics" were used as texts in the school (Tr. 415, 418, 435, 437; Gov. Exs. 3–A—3–N). These books represented the aims and objectives of the Party throughout Nowell's membership (Tr. 415, 421).

Nowell testified that during his membership in the Communist Party its aim and purpose (Tr. 1213) "was to organize various segments of the population, especially industrial labor, to elevate their political thinking along Communist lines—to direct them in accordance with the Communist policy and organizational strategy towards, and directly to, overthrowing the government of the United States", and the "establishing of the dictatorship of the proletariat in accordance with the Soviet form of government". This, he testified, would come about only through the violent destruction and dismemberment of this government and the establishment of a dictatorship of

[3] These were (Tr. 416-417): "The Communist Manifesto", by Karl Marx and Frederick Engels; "State and Revolution", by V. I. Lenin; "Left-Wing Communism—an Infantile Disorder" by V. I. Lenin; "The Program of the Communist International"; "The Communist Party—A Manual on Organization", by J. Peters; "The Struggle Against Imperialist War and the Tasks of the Communists"; "Why Communism", by M. G. Olgin; "Why Every Worker Should Join the Communist Party"; "Problems of Leninism", by Joseph Stalin; "The Ultimate Aim"; "Report of the Eighth Convention of the Communist Party", by Earl Browder; "Resolutions—Seventh Congress of the Communist International Including Closing Speech of G. Dimitrof"; and "The Twenty-One Conditions of Admission Into The Communist International", by O. Pianitski.

the proletariat similar to the Soviet form (Tr. 1217–1218).

(*b*) Witness Baxter also testified as an expert on the Communist Party. He was a Communist Party member from 1927–1945, holding various offices at the District level in California, Pennsylvania, and Ohio during much of this period (Tr. 717–719). After joining the Party in 1929, he attended classes for new members (Tr. 719). Later, Baxter was nominated by the Comintern faction of the Profintern, the Red International of the Labor Unions, to attend the Lenin Institute in Moscow. After his selection was approved by the National Central Committee of the Communist Party, he went to Moscow and attended that school in 1929 and 1930 at the expense of the Russian government (Tr. 719–723). There, his instructors were leaders of the Russian Communist Party and the Comintern, and officers of the Red Army (Tr. 722). He and the other American and Canadian students were taught political economy, Marxism-Leninism, party structure, history of trade unionism, methods of conducting illegal work, the use of firearms, and insurrectionary measures to be used at certain periods (Tr. 722, 726–734). The class was taught that the Communist Party of the United States was the United States section of the Communist International, that William Z. Foster and Earl Browder of the Communist Party of the United States were both members of the Executive Committee of the Communist International at the time, that the International and the Communist Party of the United States exchanged representatives, and that the Ameri-

can party was subject to the control of the International and its highest governing body, the World Convention (Tr. 735–736, 741). The students were also taught that the objective of the Communist Party of the United States was the overthrow of the United States Government as the political representative of the capitalistic class, and the establishment of proletarian dictatorship until Communism could be established in the United States (Tr. 741, 744). This was to be accomplished, they were taught, only when the demand of the masses for a change had been created, and when the Party leadership decided that the time for insurrection and the arming of the working classes had arrived (Tr. 743–744).

On his return to the United States, Baxter taught at various Party schools from 1932 to 1941 (Tr. 745–746). In a course on "The State and Revolution," he taught the necessity of the overthrow of the capitalistic state based on the experience of the Paris Commune and the Russian Revolution. Specifically, he taught that only through the overthrow of the United States Government could Communism be achieved in this country (Tr. 747–748). He identified various of the Party "classics" in use through 1938 as stating the aims and principles of the Party (Tr. 755–761).[6] These aims and principles which he taught in his classes (Tr. 811) included the establishment of a Soviet state in this country following a successful

[6] These included "United Front against Fascism," by Dimitrov; "The Communist Party—A Manual on Organization," by J. Peters; "Struggle against Imperialism, War and the Task of the Communist"; and "Problems of Leninism."

overthrow of the present United States Government (Tr. 762). This would be accomplished only through a forceful revolution to establish the dictatorship of the proletariat which would govern until a system of Communism would be established (Tr. 766). The notion that revolution could be achieved by the ballot was completely rejected by the Communist Party as "opportunism of the worst type," without support in either the writings of Lenin or Stalin (Tr. 786, 787–790). From the Marxist viewpoint, force is "the midwife of revolution" and is "the weapon that produced a new birth" (Tr. 780). The Party, during Baxter's membership, adhered to the theory that it could come to power only by the forceful and violent overthrow of the rule of the bourgeoisie since the ruling class would never give up peacefully. This principle was enunciated by Dimitrov in "United Front against Fascism" which was a report to the Seventh International and set forth policies which remained in effect until September 1939 (Tr. 800–802). Baxter testified that, while Communist methods and tactics varied during the period of his membership (1927–1945), the ultimate objective of achieving the forceful overthrow of the Government of the United States by force of arms did not (Tr. 808).

4. At the conclusion of the trial, the District Court dismissed the first charge, that petitioner falsely denied his Communist Party membership (App. 26), since, due to the lapse of time and lack of any notation on the naturalization petition relating to the question, the court felt that it was unlikely that the examiner actually remembered questioning petitioner as they

testified and, hence, that their testimony was not "clear, unequivocal and convincing on this issue."

The court, however, found (under charges 2, 3, and 4 of the complaint (*supra*, p. 7)) that petitioner (App. 31) answered "No" to Question No. 28 of his original petition, "Do you belong to or are you associated with any organization which teaches or advocates * * * overthrow of existing government in this country?", when in fact he had been a member of the Communist Party from 1935 at least through 1937 and 1938, knowing and approving (App. 27) "its main aim and objective which was the overthrow of this government by force and violence," and also that (App. 27) "he intended to conceal such membership and such knowledge both when he signed his petition and when he was examined" (see also App. 32).

The court also found that the same evidence which showed that petitioner was, at the time he answered Question 28, knowingly a member of such organization, also proved that he had procured his naturalization illegally, since as such person he was not then (App. 32) "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same", within the meaning of Section 4 of the Nationality Act of 1906, 34 Stat. 596.

The court specifically found (App. 33–34):

> Defendant's failure to make proper disclosure was not innocent. The concealment was deliberate—dictated by a desire to mislead lest what he was seeking would be denied.
>
> Further, also, in considering defendant's at-

tachment to the principles of the Constitution. Here we are dealing with a state of mind, to-wit—defendant's intention at the time he swore allegiance to this country. Our guide is defendant's own words and conduct both prior and subsequent to his oath. *Knauer* v. *United States,* 328 U. S. 654; *Orth* v. *United States* and *U. S.* v. *Schlotfeldt, supra.* What more could be necessary?

Through the thirties this defendant was a militant communist. At one time he said, referring to the actions of the members of the Communist Party—

"* * * the goal of all this activity was to extend the Soviet system around the face of the earth."

Note the words—"the Soviet System"—Was defendant attached to the principles of our Constitution?

The court has carefully read *Schneiderman* v. *United States, supra,* and *Baumgartner* v. *United States,* 322 U. S. 665, two controlling opinions in denaturalization cases. We think this case distinguishable from those two for the reason that Nowak's conduct does not consist of sporadic expressions indicating that all cultural ties with the motherland have not been severed. Indeed the rivalry here is not between land of birth and land of adoption, but between the latter and a political ideology. Furthermore, while vocal outbursts often belie the mind, no such disparity exists between thought and continuous, systematical conduct. * * *

On appeal to the United States Court of Appeals for the Sixth Circuit, the court, after finding the

judgments of denaturalization in both Nowak's and Maisenberg's cases legal in all respects, and that the affidavits of good cause were likewise sufficient, held that (N. Pet., App. 6a) "[u]pon the entire record, we are of the opinion that the United States proved the allegations upon which the certificates of naturalization were cancelled, by clear, unequivocal and convincing evidence."

SUMMARY OF ARGUMENT

I

The statute requires, as a preliminary to denaturalization proceedings, that there be filed an "affidavit showing good cause therefor." In these proceedings, an attorney of the Immigration and Naturalization Service duly executed and filed an affidavit with respect to each of the two petitioners, Nowak and Maisenberg, reciting that the attorney had access to the records of the Service, "from which the following facts appear":—that in the prenaturalization proceedings petitioners had made specific statements under oath that they were attached to the principles of the Constitution, and did not belong to any organization that taught or advocated the overthrow of the existing government; that petitioners' statements were in fact false in that petitioners had been active members of the Communist Party at specific times before and at the time of naturalization, and had continued such membership to the date of the complaints; and that the Communist Party advocated the violent overthrow of the United States Government and circulated literature to that effect (the affiant specifying

the doctrines and conduct evidencing the subversive nature of the Party). Petitioners complain that these affidavits were insufficient, since, in their view, the affidavits may not be based upon an analysis of documents and evidence, but must be the product of eye-witness observation and the underlying facts should be set forth in detail. The government's position is that no such requirements are established by the statute, and that the contrary is proved by the history and the decisions.

A. The affidavit need not be made by one with personal knowledge of the facts.

1. The statutory term "affidavit" is not restricted to the statement of an eye-witness. When draftsmen desire the statement of an eye-witness, as in Rule 56 (e), F. R. Civ. P., they add that requirement specifically. Moreover, the instant statute specifies "affidavit" in the singular form, whereas it would be a rare case in which a single person would have personal knowledge of all the facts warranting denaturalization; a chain of affidavits would be necessary. As the Congress must have been well aware, a chain of persons making affidavits could scarcely be obtained prior to the mandatory compelling of testimony at the trial itself. This Court, in *United States* v. *Zucca*, 351 U. S. 91, 98, significantly indicated that the affidavit of the General Counsel of the Immigration and Naturalization Service, as referred to in *United States* v. *Minker*, 350 U. S. 179 (No. 35, O. T. 1955, Gov. Br. 34), would suffice.

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[7] The affidavit in Nowak's case is set forth in the Appendix, *infra*, pp. 129–133.

2. Moreover, in *United States* v. *Zucca, supra,* the Court took note of the contemporary views of Attorney General Bonaparte with respect to the affidavit requirement; in the same 1907 denaturalization proceeding in which his views were enunciated, an affidavit was accepted in which the affiant, the Chief of the Passport Bureau of the Department of State, patently had no personal knowledge of the European matters attested. A contemporary 1907 text, also cited by this Court in *Zucca,* indicates that affidavits by this official were the general practice in showing good cause for the proceedings, and an executive order of 1907 specifically authorized officers to certify as to alien residence abroad although the residence was "prior to [the officer's] having personal knowledge on the subject."

3. The decisions likewise disclose acceptance of affidavits on information and belief as early as 1909. Affidavits substantially similar to those in the instant cases have been a part of the facts in a long array of denaturalization cases before this Court, without invoking or warranting attention or criticism by counsel or the Court. Direct attention to the matter was given at an early date in *United States* v. *Leles,* 227 Fed. 189 (N. D. Cal.), affirmed, 236 Fed. 784 (N. D. Cal.), and again recently in the Sixth Circuit, in the present cases, and the Seventh Circuit (*United States* v. *Minerich,* decided December 5, 1957, No. 12005); those courts have squarely sustained affidavits upon information and belief, comparable to those presented here.

4. Significant analogies appear in the showing re-

quired preliminary to the very serious matter of criminal indictment and preliminary to searches. This Court, in *Costello* v. *United States*, 350 U. S. 359, 361, 363–364, rejected the contention that "firsthand knowledge" must be presented as the basis for a criminal indictment, and in *Brinegar* v. *United States*, 338 U. S. 160, 175–176, pointed out that probable cause with respect to a search could rest upon trustworthy information.

B. *United States* v. *Zucca, supra,* indicated that an affidavit merely stating "ultimate facts" would not suffice, but, in requiring "evidentiary matters" in contrast to "ultimate facts," the Court surely did not demand a setting-forth of the entire evidence necessary to prove the case at the trial. While the statements in the instant affidavits that petitioners' naturalizations were "fraudulently" and "illegally" procured were statements of the ultimate facts, that is not true of the specific statements of petitioners' false oaths of non-membership in subversive organizations, and of their actual membership in the Communist Party (stating the exact years). These were statements of matters going to prove—*i. e.*, evidentiary of—the ultimate facts, and are not made the less so by the circumstance that at the full trial they would be supported by further underlying testimony and detail. Nor is it dispositive or even significant that the complaints instituting these proceedings were as specific as the affidavits. While *Zucca, supra,* 351 U. S. at 98–99, pointed out that a separate affidavit would have to be filed irrespective of the contents of the complaint, in view of the "modern

practice" under which a complaint was "required merely to allege ultimate facts," the Court stayed scrupulously clear of the requests of both the government and Zucca to appraise the language of the complaint there as either sufficient or insufficient to show good cause; the Court simply rested on the fact that no affidavit at all had been filed. Moreover, the Court, in adverting in *Zucca* to the damage done an alien's reputation by the mere commencement of a denaturalization proceeding, could scarcely have intended that the damage be compounded by the additional filing of an affidavit or chain of affidavits embodying an array of assertions of witnesses, documentary specifications, and repetitions and refinements of detail.

In short, it was sufficient that the ultimate facts of fraud and illegality were here supported by the specification of the particular false statements and the actual time of membership in the Communist Party, to a degree sufficient to show good cause for institution of the denaturalization proceedings.

II

One aspect of fraud relied on both in this case and in the companion *Maisenberg* case, No. 76, is that each petitioner, in executing Preliminary Form A–2214 for a Petition for Naturalization in 1937, swore falsely in answering in the negative Question 28 (*i. e.*, "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?") when in fact each was at that time, and had been for some years prior thereto, a member of such

an organization, the Communist Party, knowing of its teaching and advocacy. Petitioners first argue that, even if the evidence sufficiently establishes that the Communist Party was such an organization with their knowledge, the inquiry made in Question 28 was immaterial, since knowing membership in the Party was not (they say) a bar to naturalization in 1938.

A. Petitioners' argument basically assumes that the issue of materiality turns on a showing that the question, if answered truthfully, would have itself established a bar to citizenship, and that they could with impunity misrepresent any fact which, if truthfully answered, would not have established a complete bar to naturalization. But whether the naturalization court would have been justified in denying citizenship on the basis of the truthful answer is beside the point. What is important is that the court was foreclosed, by the false answer, from making an inquiry into and evaluating information which was highly pertinent to the issue of petitioners' attachment to the principles of the Constitution and the other prerequisites for citizenship. The test of materiality is whether the question seeks information of past behavior *pertinent* to the prerequisites of citizenship enumerated in the statute, not whether the information would be dispositive in itself.

This proposition is clearly established by the language of relevant parts of the 1906 Act and the regulations in force at the time of petitioners' naturalization. The 1906 Act, as amended by the Act of March 1929 (45 Stat. 1512, Sec. 6 (b), 8 U. S. C. (1934

ed.) 382, *supra*, p. 3), clearly provided that "[n]o alien shall be admitted to citizenship" unless during relevant periods he has behaved as a person "attached to the principles of the Constitution of the United States", in addition to other qualifications. To make proper inquiry into such facts, designated examiners were authorized (8 U. S. C. (1934 ed.) 399a (a)), "to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization", and the regulations then in force described in detail the broad range of subject-matter which should be gone into, including facts relative to the applicant's attachment to the principles of the Constitution. The scope of the inquiry was necessarily broad since naturalization officers were required, not only to probe the applicants' present state of mind, but also his *behavior* over a period of years as a man attached to the principles of the Constitution and well disposed to the good order and happiness of the United States. *Schneiderman* v. *United States*, 320 U. S. 118, 133–134; *United States* v. *MacIntosh*, 283 U. S. 605, 616–617.

Intelligent appraisal of a man's past behavior, in relation to his present state of mind, requires full disclosure of all pertinent information; falsification forecloses inquiry as to whether such relevant data are consistent with the statutory prerequisites for citizenship. The fact, for example, that a person has been arrested and charged with crime is not *per se* a disqualification for citizenship. Yet a false answer on this subject—obviously germane to the issue of behavior as a person of good moral character—has

consistently been held to be a material falsification, on the theory that the falsification precluded opportunity for investigating fitness for citizenship. The same rationale applies to current membership in an organization teaching and advocating the overthrow of the United States Government—a subject undeniably relevant to the statutory issue of attachment to the Constitution.

B. 1. Since Question 28 was undoubtedly material to the "attachment" prerequisite in Section 4 of the 1906 Act, the fact that Section 7 of that Act, 8 U. S. C. (1934 ed.) 364 (barring anarchists from citizenship), does not itself reach members of organizations advocating or teaching the overthrow of government, or the Communist Party itself, has no proper bearing. That Congress, in 1906, may have specifically disqualified anarchists from citizenship as a class does not mean that it intended to limit the inquiry into the applicant's behavior (as one attached to the principles of the Constitution) to the question of whether he was an anarchist. The fundamental requirement that only those who shall have behaved as men of good moral character attached to the principles of the Constitution and well disposed to the good order and happiness of the United States was first written into the Naturalization Act of 1795 (c. 20, 1 Stat. 414), during a period of political ferment in Europe, to protect this country from those who would destroy our constitutional establishment. The history of the 1906 Act shows that its purpose was to prevent naturalization frauds and to add new qualifications to the basic naturalization laws, in addition

to the traditional qualifications which were carried forward in Section 4 of that Act. Nothing in this history suggests a purpose to alter the fundamental prerequisites of citizenship, including attachment to the principles of the Constitution, or to limit inquiry to the single issue of anarchy.

Membership in organizations inimical to our constitutional principles of government was uniformly regarded by the courts as material under the 1906 Act. While many of the cases raised issues as to whether the organization did advocate "overthrow" or rather advocated change within the framework of the Constitution, there was no doubt that membership of the former kind was material to the issue of attachment. In *Schneiderman* v. *United States*, 320 U. S. 118, this Court did not suggest that organizational membership is immaterial to the question of attachment but only, at the most, that the government cannot establish lack of attachment on the basis of mere organizational membership alone.

2. Petitioners also seek support for their view that Question 28 was immaterial in the fact that the various deportation and exclusion laws have, since the Immigration Act of March 3, 1903 (Sec. 2, c. 1012, 32 Stat. 1213), specifically adopted the standard of "advocacy of overthrow of the government of the United States", while the naturalization laws failed to include such advocacy as a disability (in addition to the specific prohibition against anarchy) until 1940. But, again, this is an irrelevant factor. The primary standards for admission to citizenship, which have remained essentially unchanged since 1795, are broad

enough, without more specific enumeration, to comprehend *any* conduct of the applicant which bears on the question of his attachment to the principles of the Constitution.

Indeed, the fact that alien members of such organizations are barred from legal residence in this country, under the immigration laws, suggests in itself the relevance of an inquiry into such membership in naturalization proceedings. While the inquiry in naturalization is "an 'elastic' test", concerned with the qualifications of *individuals* rather than a class, the fact that Congress has selected certain groups as constituting a particular danger and has proscribed their legal residence, does have a bearing on the issue of individual fitness for citizenship, especially where it can be shown that the individual is identified in every important respect with the group evil which led Congress to exclude or deport the group as a class.

III

A. Petitioner contends that Question 28 (*supra*, pp. 7, 34) is ambiguous in that it permits two interpretations:—one, concerning membership in anarchist organizations alone, and the other also concerning membership in an organization teaching and advocating "the overthrow of existing government in this country." The two categories, however, are plainly enumerated in the disjunctive; as a matter of grammar, the question relates to membership in an organization teaching or advocating (1) anarchy *or* (2) the overthrow of the existing government.

Moreover, the question cannot be considered in the

abstract. *American Communications Ass'n.* v. *Douds* 339 U. S. 382, 412–413. By 1937, the deportation and exclusion laws had for years covered, under phraseology not unlike Question 28, both categories of membership. It was very well known that this language in the immigration laws had been applied to Communists, as well as to anarchists. The evidence that petitioner, an intelligent man, had for years been an important functionary in the Party, well indoctrinated in its principles, including that of maintaining membership secret from official notice, strongly supports the conclusion that he knew the meaning of Question 28 and intended to falsify his answer, and thus perpetrate a fraud on the naturalization court in its inquiry into his fitness.

B. In the courts below, petitioner did not contest the sufficiency of the evidence to prove his membership in the Communist Party or the proof that the Communist Party did in fact teach and advocate the violent overthrow of the government, but only the sufficiency of the evidence to show his knowledge of the Party's teaching and advocacy. Now for the first time he contends that even the issue of membership was not proved by clear, convincing, and unequivocal evidence. He cites several factors (*i. e.*, the interval between his naturalization and the instant cancellation proceedings; the asserted change of attitude toward the Communist Party; and the fact that false swearing charges against him were dismissed without trial in 1942)—which he contends make the unrebutted testimony of the government witnesses less credible. However pertinent these

factors might be in cases where the evidence of membership is equivocal, this is not such a case. There is overwhelming testimony of eight witnesses that petitioner was not only a member but a completely assimilated and active one, and an important leader in the party.

C. Petitioner also now challenges, for the first time on appeal, the sufficiency of the evidence to prove that the Communist Party was an organization teaching or advocating the overthrow of the United States Government, at the time of, and in the several years prior to, his naturalization. The belated reliance on this point seems to be prompted by this Court's recent opinion in *Yates* v. *United States*, 354 U. S. 298, involving the different issue of individual *criminal* guilt of the defendants, charged with conspiracy in violation of the Smith Act to teach the duty and necessity of overthrowing the government of the United States by force and violence from 1945 to 1951. Here, however, the character of the Communist Party in 1937–1938 is at issue in the context of a naturalization proceeding, rather than the criminal guilt of the petitioner for past conduct. The character of the Party, as supporting overthrow, is material because of its clear pertinency (taken together with petitioner's knowledge thereof) to the issue of attachment to the principles of the Constitution, and the truthfulness of petitioner's answer to Question 28. For those purposes, Smith Act criminal standards are irrelevant.

Petitioner also asserts that the trial court predicated its conclusions on a general finding that the aims and

purposes of the Communist Party included the overthrow of the government, rather than on a specific finding that the Communist Party had in fact taught and advocated overthrow of the government, within the meaning of Question 28. On this premise, they argue that they are deprived of First Amendment rights since the character of the Party is made to depend on its espousal of beliefs, rather than the advocacy of concrete action. The findings, however, clearly rest on proof that the Communist Party taught and advocated violent overthrow of the United States Government. Moreover, petitioner's constitutional argument, as we have already noted, misconceives the basic issue on this aspect of the case—not whether naturalization could be denied in the first instance for membership in the Communist Party, but whether the citizenship of one who falsely and intentionally answered a material question can be cancelled on proof that such material falsity was employed in obtaining his certificate of citizenship. The petitioner cannot seriously urge that the First Amendment permits falsification of any material fact in naturalization proceedings, especially a fact bearing directly on his attachment to the Constitution. Cf. *Knauer* v. *United States*, 328 U. S. 654; *Kay* v. *United States*, 303 U. S. 1, 6.

D. The evidence of petitioner's knowledge of the aims and purposes of the Party is likewise clear. Statements attributed to him by the witnesses show that he personally subscribed to the belief that it would be necessary to destroy capitalism in this country by violent revolution. Moreover, petitioner was so intimately associated with Party policy at the dis-

trict and national level, and as a Party teacher, that it is patent that he was acquainted with the Party's instruction to its membership on this issue, which was plainly stated in Party literature, including the 1935 organization manual in use during this period.

E. Petitioner also raises, for the first time in his brief on the merits in this Court, the contention that he was erroneously denied access to (1) a statement concerning petitioner allegedly given in 1940 by the witness Eager to the Immigration Service or the F. B. I. in which Eager had failed to mention certain remarks which he attributed to petitioner at the trial, and (2) the grand jury transcript of the witness Nowell given in a 1942 grand jury proceeding which had indicted petitioner in a perjury case involving his naturalization (which prosecution was later dismissed before trial). This issue is outside the grant of certiorari, and is, in any event, misconceived.

As to Eager, the demand for an alleged written report of answers was made solely on the basis that it might establish that the witness, in testifying before a congressional committee in November 1938,[8] had not given full information on some points. The trial court pointed out that answers by the witness to different questions by investigators in 1940 would not establish that his answers given the committee in November 1938 were less than complete, since there was no showing that he should have volunteered statements on matters about which he was not questioned. Moreover, no record of his 1940 answers was known

[8] A copy of this 1938 hearing was available to defense counsel.

to be in existence. *Jencks* v. *United States*, 353 U. S. 657, is inapplicable.

Nor is there validity in petitioner's contention that he was erroneously denied inspection of the 1942 grand jury transcript of witness Nowell's testimony. The court, following the procedures established by Rule 6 (e), F. R. Crim. P., with petitioner's apparent approval, read the transcript, and, when discrepancies were pointed out, announced what the testimony of the witness had been on the previous occasion,[9] and then made his ruling that, in his judgment as sole arbiter of the issue trying the case without a jury, no inconsistency had been shown. This is in accord with the procedure established by Rule 6 (e). *Costello* v. *United States*, 350 U. S. 359; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234; *United States* v. *H. J. K Theatre Corp.*, 236 F. 2d 502, 507 (C. A. 2), certiorari denied *sub nom. Rosenblum* v. *United States*, 352 U. S. 969. Since the judge was the trier of fact, all relevant materials were before him, as such trier, unlike the situation in a jury case.

IV

The complaint charged that Nowak, in his petition for naturalization, represented, *inter alia*, that he fully believed in the form of government of the United States, that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, and that these representations were false in that he concealed the fact that he was a member of the Commu-

[9] On one occasion, the court read a long excerpt from the grand jury minutes into the record.

nist Party, although he knew and personally approved of the activities, aims, and teachings of the Communist Party with respect to the violent overthrow of the government. Petitioner's contention that the court made no findings under these allegations—aside from its findings as to the false answer to Question 28—is met by the court's finding, on the basis of the detailed evidence, that "he intended to conceal such membership and such knowledge both when he signed his petition and when he was examined", and its legal conclusion that he committed a deliberate concealment in that he lacked attachment to the principles of the Constitution as was evidenced by "defendant's own words and conduct both prior and subsequent to his oath".

Taken in totality, the District Court thus found, in addition to the Question 28 fraud, that petitioner had also committed a fraud in his petition for naturalization in swearing as to attachment to the principles of the Constitution. Of course, advocacy of violent overthrow is the antithesis of attachment to the principles of the Constitution. Nevertheless, petitioner challenges the sufficiency of the evidence to show that he was not attached to the principles of the Constitution at the time he was naturalized, relying on *Schneiderman* v. *United States*, 320 U. S. 118 (a proceeding to cancel, on the ground of illegality, a certificate of naturalization issued to a Communist Party functionary in 1927), where this Court found the evidence insufficient to establish that the Party advocated the overthrow of the government by violent means and that the defendant had himself adopted the principle of

violent overthrow. That opinion, however, is neither dispositive of the issue of the nature of the Communist Party in 1937–1938 nor of the implications of another individual's membership at that time. See *Yates* v. *United States*, 354 U. S. 298, 336. Here, all of the elements of proof lacking in *Schneiderman* have been established by solid evidence—proof of the advocacy of violence by the Party and adoption of such philosophy by petitioner personally. With the additional elements found by the trial court (*i. e.*, knowledge that such advocacy was inconsistent with the requirements of citizenship and intent to conceal such knowledge in order to obtain citizenship), fraud in obtaining naturalization has been established under the standard of proof laid down in *Schneiderman*.

V

In addition to the findings of fraud, the District Court found that, since petitioner had been a knowing and participating member in an organization teaching and advocating the violent overthrow of the government, he had procured his naturalization illegally since he was not at the time a person of good moral character, attached to the principles of the Constitution and well disposed to the good order and happiness of the same, within the statutory prerequisites for citizenship under Section 4 of the 1906 Nationality Act (*supra*, p. 3).[10] Petitioner argues that, if the record is insufficient to establish fraud, his 1938 naturalization decree precluded, on the theory

[10] Since his case was begun under the Nationality Act of 1940, the ground of illegality is available as to petitioner Nowak.

of *res judicata*, any reexamination in the cancellation proceedings of his qualifications for citizenship.

This, however, is not a case in which the naturalization court, with the full facts before it, reached one conclusion, which another court in the denaturalization proceedings is reexamining. This Court has consistently held that the failure of an alien to comply strictly with the conditions which Congress has made prerequisite to an award of citizenship renders the certificate of citizenship subject to cancellation, particularly where the facts establishing non-compliance were not known to the naturalization court. *E. g., Maney* v. *United States*, 278 U. S. 17; *United States* v. *Ness*, 245 U. S. 319; *United States* v. *Ginsberg*, 243 U. S. 472; *Schwinn* v. *United States*, 311 U. S. 616.

ARGUMENT

I

THE INITIATING AFFIDAVIT SHOWED "GOOD CAUSE" FOR THE INSTITUTION OF DENATURALIZATION PROCEEDINGS AGAINST PETITIONER

Both petitioners Nowak and Maisenberg contend that the affidavits showing good cause, which were duly filed with the complaints in the denaturalization proceedings, were insufficient.[11] The essence of their argument seems to be that such affidavits may not be based upon an analysis of documents and evidence, as here, but must be the product of eye-witness observation, and must also be phrased in exhaustive detail. The government's position is that no such extraordi-

[11] The affidavit in this case is set forth in the Appendix, *infra*, pp. 129–133.

nary requirement is established by the statute or indicated in the observations of this Court in *United States* v. *Zucca*, 351 U. S. 91. The statute speaks of an "affidavit showing good cause" for denaturalization proceedings, and at no point speaks of an affidavit or—as would be required in most cases—a whole chain of affidavits in which each fact must be attested by a personal observer. In *United States* v. *Zucca*, *supra*, the Court held only that the affidavit of good cause, to comply with the statute, must be filed in court, and not merely kept in the hands of the United States Attorney; since no affidavit had there been filed, there was no occasion for the Court to determine by whom the affidavit must be made or how detailed its allegations had to be.

We submit that all that the statute required is an affidavit showing "good cause" for the institution of a judicial proceeding, which "good cause" can be shown, as in this case, by a responsible and competent person, having access to the best available collocation of documents and reports, who sets forth the specific facts upon which denaturalization is sought—even though the affiant does not himself have personal knowledge of the underlying facts. While a mere statement of ultimate conclusions, such as "fraud" or "illegal procurement," would not suffice, the affidavit is sufficient where, as here, it indicates specifically the facts on which the charge of fraud or illegality is predicated. An affidavit of "good cause" does not require the setting forth in a chain of affidavits of all the evidence that may ultimately be adduced at the trial.

A. THE AFFIDAVIT OF GOOD CAUSE FOR INSTITUTION OF A PROCEEDING TO CANCEL A CERTIFICATE OF NATURALIZATION NEED NOT BE MADE BY PERSONS HAVING PERSONAL KNOWLEDGE OF THE FACTS ON WHICH THE PROCEEDINGS ARE PREDICATED

1. *The language of the statute requires merely a showing of good cause, not personal knowledge.*—Section 338 (a) of the Nationality Act of 1940 made it the duty of United States Attorneys "upon affidavit showing good cause therefor" to institute deportation proceedings. The use of the term "affidavit" does not in itself preclude statements made upon information, or statements that might be vulnerable to some evidential ruling at a subsequent trial. This is attested by the fact that the requirement of "personal knowledge" and competency as evidence is specifically added when draftsmen intend such a restriction of the general understanding of affidavits. Thus, Rule 56 (e) of the Federal Rules of Civil Procedure, in the narrow instance of summary judgments, states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

No such restriction on the form of affidavit appears in the instant statute.

It is also significant that the Act uses the singular,

"affidavit". It would be a rare case in which a single person would have personal knowledge of all the facts which would justify the institution of denaturalization proceedings, and it would be unreasonable to attribute to Congress an intent to require a whole chain of affidavits at the very outset of the proceeding. There is no procedure, equivalent to a subpoena, by which a person having knowledge of the facts can be compelled, at the outset, to execute an affidavit as to facts within his knowledge. It is highly unlikely that Congress would impose such a requirement, without an implementing procedure for meeting it. Rather, the use of the singular form "affidavit" suggests that Congress contemplated a single affidavit by one who, on some substantial basis, was in a position to show "good cause".

Nothing in the language or rationale of this Court's opinion in *United States* v. *Zucca*, 351 U. S. 91, militates against this conclusion. The Court indicated (351 U. S. at pp. 99–100) that the purpose of a good cause affidavit is to provide a safeguard against the consequences—such as damage to reputation and standing in the community—of denaturalization proceedings brought without a preliminary showing of good cause. Affidavits such as those involved here, based on a review of the files of the Immigration and Naturalization Service, made by an attorney who states that he has had access to the records of the Service, "from which the following facts appear",[12] protect naturalized persons against irresponsible de-

[12] There is no merit to petitioner's remark that the affiant "does not state that he has even read the official records nor that he believes his allegations with respect to them to be true"

naturalization proceedings, and thus meet the reason for the requirement. In this connection, we believe it significant that the Court stated in *Zucca*, 351 U. S. at 98:

> [W]e fail to see that the requirement imposes a burden on the Government. At this Term, it has been represented to us that the usual practice is that, "if sufficient grounds are shown, an 'affidavit showing good cause' (see Section 340 (a) of the Act * * *) is prepared and executed, and is forwarded as an aid to the formal judicial proceedings * * *" [citing "Brief for the United States, *United States* v. *Minker*, 350 U. S. 179 (No. 35, October Term, 1955), at p. 34].

The page of the brief in *Minker* cited by the Court states that the affidavit is prepared in the Office of the General Counsel of the Immigration and Naturalization Service, and it thus appears that the Court considered such an affidavit, rather than a chain of affidavits of eye-witnesses, to be sufficient.

2. *The contemporary 1907 authorities relied upon by this Court in requiring a separate affidavit in United States v. Zucca, 351 U. S. 91, treated affidavits of non-eye-witnesses as sufficient.*—The Court, in considering in *United States* v. *Zucca, supra,* the historical origin of the affidavit in 1906, adverted to the "great weight" applicable to the contemporaneous construction of the statute by the officer charged with

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(N. Br. 18). The reading of the official records is unquestionably implicit in the affiant's unqualified statement that the array of facts which he details appears from "the official records" (N. App. 7a).

its enforcement, *i. e.*, then Attorney General Bonaparte. It is noteworthy that this Attorney General, whose letter dated March 26, 1907, requiring such an affidavit has been relied upon—not only by the Court in *Zucca*, 351 U. S. at 96, but also by the contemporary writer Van Dyne (*A Treatise on the Law of Naturalization* (1907 ed.), p. 138), and the Court of Appeals for the District of Columbia in 1912 in *Cohen* v. *United States*, 38 App. D. C. 123[13]—did not regard the statute as requiring an affidavit by one having personal knowledge. He accepted—in the same case as that which prompted the letter requiring the affidavit—an affidavit of the Chief of the Passport Bureau of the Department of State "as to the genuineness" of a despatch from the embassy at Vienna, a record in the Hungarian language made by a Hungarian court, a passport application, an extract from an 1876 Israelite birth record of Hommona, Hungary, with translation, and a certificate of naturalization by a United States District Court in Pittsburgh.[14] Upon the basis of this

[13] Both Van Dyne and the *Cohen* case were cited by this Court. 351 U. S. at 96.

[14] The letter to the Attorney General transmitting the affidavit was as follows (*United States* v. *Zucca*, No. 213, O. T. 1955, Gov. Br., App. 53–54):

"Hon. CHARLES J. BONAPARTE,

"*Attorney General.*

"SIR: Inclosed herewith I hand you the papers in the case of Isidore Herschkowitz, forwarded to you under cover of the letter of this Department dated January 23d, last, and returned by you on the 19th ultimo, as requested, to permit of the furnishing of the statutory affidavit upon which to base proceedings under section 15 of the act of June 29, 1906, having in

affidavit, obviously considered sufficient, Attorney General Bonaparte ordered the denaturalization action to proceed.[15] But this affidavit could not have been that of an eye-witness to a Hungarian court proceeding and a birth in Hungary in 1876, nor even to the genuineness of the documents; the affiant could only offer the attestation of a competent individual to the receipt of reports from persons deemed reli-

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view the vacation of the order of court conferring citizenship upon Herschkowitz and the cancellation of the certificate of naturalization issued thereon.

"The papers referred to consist of a certified copy of a despatch, No. 128, from the Embassy at Vienna, dated December 19, 1906; a record in the Hungarian language made November 30, 1906, by the Circuit Court of Izbugyaradvany, with translation; an application for a passport by Herschkowitz, executed August 11, 1906; an extract from the Israelite birth record of Homonna for 1876, with translation; and a certificate of naturalization issued by the District Court of the United States in and for the Western District of Pennsylvania, at Pittsburgh, July 23, 1906; also an affidavit of Gaillard Hunt, Chief of the Passport Bureau of the Department of State, dated May 4, 1907, as to the genuineness of the above documents, all of which tend to show that the said Herschkowitz was unlawfully naturalized, having been more than eighteen years of age at the time of his arrival in the United States, whereas naturalization was obtained under section 2167 of the Revised Statutes, relating to aliens who came to this country previous to becoming eighteen years of age.

"It is therefore requested that the matter be referred to the proper United States attorney for such action under section 15 of the act of June 29, 1906, as may be deemed appropriate.

"I have the honor to be, Sir,

"Your obedient servant,

/s/ OSCAR S. STRAUS,

"*Secretary.*

"R. F. G."

[15] *United States* v. *Zucca*, No. 213, O. T. 1955, Gov. Br., App. 55-56.

able. By the very nature of these denaturalization proceedings, nothing more is at all practical in the great mass of cases.

A contemporary analogy, though one of less significance, is to be found in the executive instruction of 1907 concerning certification by diplomatic and consular officers of the United States as to naturalized citizens residing in foreign countries within five years of their naturalization.[16] In the circular of the Department of State, signed by Elihu Root under date of April 19, 1907, it was specifically stated (Van Dyne, *op. cit.*, p. 137):

> * * * It is not necessary that the residence shall have been acquired during the incumbency of the certifying officer, but he may, if he is in possession of sufficient evidence, certify to a residence which was acquired *prior to his having had opportunity to have personal knowledge on the subject.* [Emphasis added.]

In the same passage by Van Dyne cited by this Court for the holding that an affidavit is necessary (*United States* v. *Zucca*, 351 U. S. at 96), a description of the affidavit is given which negates any requirement that the affiant shall have personally observed all the facts involved in the denaturalization (Van Dyne, *supra*, p. 138):

> * * * It [Sec. 15] is held to apply with equal force in cases where the information is furnished by diplomatic or consular officers. In

[16] In such a case, the certificate of the officer as to such residence was admissible in evidence (Act of June 29, 1906, Sec. 15; 34 Stat. 601).

> such cases the officer of the Department of State whose duty it is to examine and make proper disposition of the reports concerning fraudulent naturalizations received from the diplomatic and consular officers has been designated as the proper person to make the affidavit. This officer is the chief of the Passport Bureau. The affidavit states that "the papers hereto appended are the genuine documents received by" the Department of State, "and they are forwarded to the Department of Commerce and Labor to be used in proceedings to set aside as unlawfully obtained the naturalization of" X. Y.

Also indicative of what was contemporaneously considered to be compliance with the statute is the affidavit practice within a relatively short period after the original enactment of the requirement in 1906. Thus, in *Maibaum* v. *United States*, 232 U. S. 714, in which this Court sustained denaturalization, the affidavit, dated June 10, 1909, only three years after the 1906 Act, was that of the chief naturalization examiner at Chicago, Illinois, stating, upon information and belief, that the alien was not 21 years of age upon arrival and had not met the prior residence requirements (No. 4, O. T. 1913, R. 3–4). The affidavit did not indicate the sources of the information and belief, nor give further details beyond the facts as to the alien's age and lack of residence. Maibaum challenged the affidavit in the District Court as "insufficient in stating facts which would reasonably show good cause" (*Id.*, R. 11). The challenge was summarily overruled (*Id.* R. 14–15, 25–26) and was not pursued further in the appeal to this

Court (*Id.* Appellant's Br. 15–18), or referred to in the *per curiam* opinion (232 U. S. 714).

In 1915, in *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal.), affirmed, 236 Fed. 784 (N. D. Cal.), the affidavit was challenged on the grounds "(1) that it does not state facts sufficient to warrant the bringing of the proceeding, and (2) that it is insufficient, because based upon information and belief, and not the personal knowledge of the affiant" (227 Fed. at 190). The affidavit was as follows (227 Fed. at 191):

> The affiant further states that he is informed and believes that the said John Leles was not qualified to become a naturalized citizen of the United States, in that he was not a person of good moral character for the five years immediately preceding the date of his application for naturalization in the above referred to court.
>
> The affiant further states that he is informed and believes that the said John Leles procured naturalization in an illegal manner and in violation of section 9 of the act of June 29, 1906 (34 Stat. part 1, p. 596), in this respect, to wit, that the court ordered, adjudged, and decreed the said John Leles a citizen of the United States upon the testimony of witnesses who were not examined under oath in open court, before the court, and in the presence of the court, nor was their testimony taken by deposition in the manner prescribed in section 10 of the act of June 29, 1906 (34 Stat. part 1, p. 596).

The court sustained the affidavit as a sufficient showing of illegal procurement (though not of fraud), stating (227 Fed. at 191–192):

> * * * The provision requiring the affidavit must have a reasonable construction, that will enable it to have application to the varying circumstances under which it may be desirable to invoke it. In the very nature of things, many instances are likely to arise where, although there is good reason to believe the statute has been violated, the agent making the investigation and swearing to the affidavit is without personal knowledge of the facts, and *there is no one having such knowledge willing to be sworn.* The statute would prove impotent indeed if, in such a case, it could not be put in motion for want of some one with personal knowledge of the facts constituting the particular fraud or illegality. * * *
>
> This language is peculiarly applicable to the character of facts required to be inquired into under this statute for the information of the district attorney. They are, in their very nature, of a character of which personal knowledge may not readily be had, and will frequently depend for their value upon their legal effect. [227 Fed. at 192; emphasis added.]

3. *The courts have approved or acted upon affidavits not purporting to be made upon direct observation.*—In addition to the direct approval below of the form of affidavit in the present cases, the Court of Appeals for the Seventh Circuit, in *United States* v. *Minerich* (C. A. 7, No. 12005, decided on December 5, 1957), sustained an affidavit substantially similar to that made here, by the same attorney, and specifically employing the same language that "as such [attorney] has access to the official

records of the said Service, from which the following facts appear * * *."[17] The court concluded (slip op., p. 7; emphasis added):

> The proposition which the government, in these denaturalization cases, desires to prove is that citizenship was, at an earlier date, procured under circumstances described in § 340 authorizing annulment of the order admitting an alien to citizenship. The affidavit, then, should reveal facts offered to establish that proposition. See *e. g.* 1 Wigmore § 2 (3rd ed. 1940). This simply means disclosing *some* of the premises from which the conclusion is drawn, by the United States attorney, that § 340 proceedings are warranted. From such an affidavit an experienced judge should be able to detect a United States attorney's reckless categorization or noncritical selection of candidates for denaturalization, and we think that is all Congress intended by the procedural safeguard. Certainly a pre-trial preview of the complete array of evidentiary facts which the government intends to establish through evidence, parol and documentary, at the trial is far in excess of the showing called for by Congress. We think the concept[18] "good cause" entails more than the nature and quality of the evidentiary facts arranged in § 340 affidavits. Experience exposes the fallacy of certainty in ordinary human affairs and leads to the practical usefulness of the

[17] The full text of the affidavit is given in the slip opinion, p. 2, fn. 1.

[18] We discussed the concept of "probable cause" and "reasonable grounds" in our opinion reported as *United States* v. *Walker*, 246 F. 2d 519 (7th Cir. 1957) [court's footnote 3].

> "good cause" criterion. These affidavits are the means by which courts can ascertain whether the United States Attorney's conclusion about instituting denaturalization proceedings dictated what the reasoning ought to be, in contradistinction from an affidavit showing the basis for reasoning which determined what his conclusion in that regard shall be. It is in this aspect that the affidavit filed below meets the statutory test of "good cause." *It is unnecessary that an affiant exhibit personal knowledge of each atomic fact* he reads in the Service's files. In daily affairs *men constantly rely on unverified judgments yet in so doing act with good cause. After all, the acid test of verification is available to both sides during the denaturalization proceeding.*[19]

From an early day, affidavits similar to those in the instant case have been used in denaturalization cases before this Court, without drawing the criticism either of counsel or of the Court. We have already noted, *supra*, pp. 55–56, the 1909 affidavit in *Maibaum* v. *United States*, 232 U. S. 714 (No. 4, O. T. 1913, R. 3–4, 11, 14–15). In *United States* v. *Ness*, 245 U. S. 319, in which this Court held that a denaturalization action should have been sustained, the affidavit was that of an examiner of the Division of Naturalization (No. 284, O. T. 1917, R. 3), whose statements do not appear in the record but who would scarcely have been an eye-witness to the details of the alien's

[19] For recent Second Circuit decisions pertaining to denaturalization affidavits, see *Matles* v. *United States*, No. 378, this Term, and *Lucchese* v. *United States*, No. 450, this Term, both pending on petitions for writs of certiorari.

failure to file a certificate with his naturalization petition, and to the failure of the alien to present himself to an officer upon entry into the United States six years before, pay a head tax, and take a physical examination (*Id.* R. 1–2).[20]

In *Maney* v. *United States,* 278 U. S. 17, in which the Court sustained denaturalization for failure to file a certificate with the naturalization petition, the affidavit was that of the chief naturalization examiner of the district, stating that "according to the records" of the district court the naturalization petition was filed on November 13, 1923; that "at the time of filing" of the naturalization petition there was not attached a required certificate of the Department of Labor; and that such certificate was issued on November 24, 1923 "And was mailed to the clerk of the Court on December 3, 1923 and attached to the petition by order of the Court on February 11, 1924 * * *" (No. 27, O. T. 1928, R. 4–5). And in *Schwinn* v. *United States,* 311 U. S. 616, upholding denaturalization on the ground of illegal procurement, the affidavit was that of an attorney in the Immigration and Naturalization Service (No. 337, O. T. 1940, R. 6); while the affidavit is not reproduced in full in the record, there

[20] It is of interest to note, in Mr. Justice Brandeis' opinion upon another aspect of the case, a higher regard for the admittedly indirect knowledge of immigration officials than that here decried by petitioner (245 U. S. at 327):

"It was the purpose of Congress, by providing for appearances under Section 11, to aid the court of naturalization in arriving at a correct decision * * *. In most cases this assistance could be given best by an experienced examiner of the Bureau of Naturalization *familiar with the sources of information.*" (Emphasis added.)

is no indication that the attorney was an eye-witness, or that he presented a fully detailed basis for his statements relating to the alien's entry into the United States eleven years before, and the lack of a sufficient period of acquaintance by two witnesses (*Id.* R. 4). While the attention of the Court, in affirming denaturalization upon the ground of illegal procurement, was not focused upon the affidavit (see *United States* v. *Zucca, supra,* 351 U. S. at 96–97), the indirect nature of the affiant's knowledge and the limitation of detail were clearly indicated in the record.

This Court pointed out in *Zucca* that it had "had occasion to notice the affidavit provision" in *Johannessen* v. *United States,* 225 U. S. 227, 242, and *Schneiderman* v. *United States,* 320 U. S. 118, 159, fn. 54. The *Johannessen* affidavit could not present the instant question since it was the affidavit of Johannessen himself. But in *Schneiderman* the affidavit was that of an attorney of the Immigration and Naturalization Service, stating (as here) that he "has access to the official records of said Service, from which the following facts appear" (No. 2, O. T. 1942, R. 7). The body of the affidavit was, if anything, less extensive than that of the instant case. But neither the diligent counsel in that case (*Id.* R. 10, par. III, 57–58, 64, 80–81, 900–902, Pet. Br. 3–5), nor this Court or the lower courts (*Id.* R. 48, 909–910), in extensive attention to the entire range of problems involved, found any such deficiency in this type of affidavit as is now claimed.

In *Baumgartner* v. *United States,* 322 U. S. 665, the affidavit was that of an F. B. I. agent based upon

records of government agencies and investigation of statements of the alien for a period commencing 15 years prior to the affidavit, and stating facts commencing in 1895 (No. 493, O. T. 1943, R. 5). The affiant in large part stated the various facts without specifying further supporting facts, sources, or informants (*Id.* 4–10). More recent acceptance of affidavits of immigration officials and attorneys, patently based upon information and belief derived from records, without specification of exhaustive detail and sources, may be noted in *United States* v. *Krause*, 136 F. 2d 935 (C. A. 7), certiorari denied, 327 U. S. 781 (No. 702, O. T. 1945, R. 5–7) (a denaturalization based upon a false declaration of termination of adherence to Germany), and in *Sweet* v. *United States*, *Chemick* v. *United States*, and *Charnowola* v. *United States*, 211 F. 2d 118 (C. A. 6), certiorari denied, 348 U. S. 817 (No. 73, O. T. 1954, Appellant's App. 8a–14a; No. 74, O. T. 1954, Appellant's App. 6a–10a; No. 75, O. T. 1954, Appellant's App. 6a–12a) (three denaturalizations based upon fraudulent, or illegal procurement of, naturalization by former members of the Communist Party).[21]

[21] Noteworthy, also, are somewhat earlier cases in the lower courts. In 1925, in *United States* v. *Ali*, 7 F. 2d 728 (E. D. Mich.), a certification of naturalization was cancelled as procured by one not a white man. There was no challenge of the affidavit although the affiant, a naturalization examiner, alleged, obviously upon information and belief, that the alien had been born in 1875 in Karpurthala, India, and was not a white person nor of African nativity or descent. In 1929, in *Turlej* v. *United States*, 31 F. 2d 696 (C. A. 8), the certificate of naturalization was cancelled by reason of the falsity of the alien's assertion of attachment to the principles of the Con-

4. *Information and belief are a sufficient basis for preliminary protection against unwarranted proceedings in comparable situations in the course of criminal actions.*—The provision for an affidavit as a safeguard against irresponsible institution of denaturalization proceedings may appropriately be likened, in certain respects, to the safeguards against unwarranted criminal proceedings and to protections against unwarranted search. In both of these analogies, the distinction is observed between maintaining the adequacy of the safeguard and an improper insistence upon converting the safeguard into a virtual trial in itself.

(*a*) With due regard to the harm that may be done the defendant by the initiation of a denaturalization proceeding, it cannot be denied that equal and greater harm ensues when a person is publicly charged with crime. A precaution against improper initiation of a criminal proceeding is the initiating step of indictment by a grand jury, and here we find that recogni-

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stitution. The alien challenged the affidavit as insufficient. No affidavits of eye-witnesses were apparently supplied, for reference is made to only a single affidavit, which must have been based in large part upon information and belief since it attested pleas of guilty and conviction of guilt of several liquor offenses, and an assault charge, over a period of four years prior to and after the naturalization hearing. In 1951, *Zurini* v. *United States*, 189 F. 2d 722 (C. A. 8), denaturalization by reason of foreign residence was sustained, in a proceeding in which the affidavit, unchallenged although obviously upon information and belief, was that of a United States Vice Consul at Trieste, Italy, attesting (upon the basis of a sworn statement to him) Zurini's residence in Tarcento, Italy, his marriage there, and the date and price of his house, and further attesting Zurini's former address in the United States.

tion of the preliminary nature of the step which we urge with respect to the preliminary step in denaturalization. In *Costello* v. *United States*, 350 U. S. 359, there was urged essentially the contention now urged; Costello demanded the whole detail of what was before the grand jury, on the ground that it would disclose that the jury acted upon evidence that would not be competent at the trial itself (350 U. S. at 360). Costello further pointed out, upon the basis of later disclosures, that the only evidence before the grand jury had been hearsay testimony as to transactions of which there had been "no firsthand knowledge" (350 U. S. at 361). This Court rejected the contentions, stating (350 U. S. at 364):

> * * * In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.[22]

(*b*) Petitioner himself adduces as an analogy the determination of probable cause under the Fourth Amendment's prohibition of search warrants except "upon probable cause, supported by oath" (N. Br.

[22] Mr. Justice Burton, concurring, employed language fully applicable to, and dispositive of, the instant petitioners' challenge (350 U. S. at 365):

"* * * To use Justice Holmes' phrase in the *Holt* case [218 U. S. 245], such testimony, standing alone, was 'incompetent by circumstances' (*supra*, at 248), and yet it was rationally persuasive of the crime charged and provided a substantial basis for the indictment. At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained."

22). But the early cases cited by petitioner (N. Br. 22) are inapposite and must, in any event, yield to the definitive principles set forth by this Court in *Brinegar* v. *United States*, 338 U. S. 160, 175–176:

> * * * Probable cause exists where "the facts and circumstances within their [the officers'] knowledge *and of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. * * * [Emphasis added.]

The Court rejected the earlier dictum of *Grau* v. *United States*, 287 U. S. 124, 128, to the effect that the facts must be evidence which is competent to convict, and said (338 U. S. at 175):

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

While the Court in *Brinegar* v. *United States, supra*, was dealing with probable cause to search without a warrant, its discussion of *Grau* and other decisions relating to search warrants (338 U. S. at 174–176, particularly fns. 13 and 15) shows that the "probable cause" definition there laid down was intended to apply generally to all searches. Its ruling has been so interpreted in *Washington* v. *United States*, 202 F. 2d 214, 215 (C. A. D. C.), certiorari denied, 345 U. S. 956, and *Hawkins* v. *United States*, 238 F. 2d 265

(C. A. D. C.), certiorari denied, 353 U. S. 925 (No. 538 Misc., O. T. 1956).[23]

(*c*) Opinions of lower courts concerning affidavits preliminary to extradition or relating to Rule 3, F. R. Crim. P., cited by petitioner at N. Br. 22, deal with special provisions and present a variety of factual situations which are of little assistance in the cases at bar. Thus, *Raftery* v. *Bligh*, 55 F. 2d 189 (C. A. 1), apparently cited for its broad dictum concerning a requirement of personal knowledge by an affiant, is sharply contradicted by its own concurring opinion (55 F. 2d at 196), and relies for the dictum upon earlier, unpersuasive decisions of which at least one (*Wagner* v. *United States*, 8 F. 2d 581 (C. A. 8)) is based upon special provisions of prohibition legislation under which not only an affidavit but appar-

[23] Of the cases cited by petitioner (N. Br. 22), *Nathanson* v. *United States*, 290 U. S. 41, 44, 47, involved issuance of a search warrant upon the affiant's bare declaration that "he has cause to suspect and does believe that [certain liquors had been imported contrary to law]," without supporting circumstances. Substantially the same mere expression of belief in the ultimate fact, without the next layer of supporting facts, appeared in petitioner's remaining citations, *i. e.*, *Sutherland* v. *United States*, 92 F. 2d 305, 306–307 (C. A. 4); *Simmons* v. *United States*, 18 F. 2d 85, 88–89 (C. A. 8); *Reeve* v. *Howe*, 33 F. Supp. 619, 621–622 (E. D. Pa.); *United States* v. *Reynolds*, 111 F. Supp. 589, 590 (D. D. C.); *United States* v. *Office No. 508 Ricou-Brewster Bldg.*, 119 F. Supp. 24, 28 (W. D. La.). In *United States* v. *Kennedy*, 5 F. R. D. 310, 312 (D. Colo.), the full facts do not sufficiently appear to permit comparison with the instant case. *United States* v. *Hill*, 114 F. Supp. 441, 442–443 (D. D. C.), rather than supporting petitioner's contentions, finds probable cause sufficiently set forth, although initially based upon mere information and only partially checked by observation.

ently detailed examination under oath were provided (8 F. 2d at 583).[24]

If there is to be comparison with the affidavit provision of the extradition enactments, we submit that the better view is applied in *In re Strauss*, 126 Fed. 327 (C. A. 2), certified questions answered, 197 U. S. 324, sustaining an affidavit described as follows (126 Fed. 330–331):

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[24] The same special considerations of the prohibition enactments diminish the pertinence of *United States* v. *McCunn*, 40 F. 2d 295 (S. D. N. Y.). In *United States ex rel. McCline*, v. *Meyering*, 75 F. 2d 716 (C. A. 7), also cited by petitioners (N. Br. 22), the affiant, two years after the murder, stated details of the murder at which she had not been present, and without reference to any "reasonable ground" for her beliefs (75 F. 2d at 718). In *Ex parte Morgan*, 20 Fed. 298 (W. D. Ark.), the affidavit was not properly certified (20 Fed. at 307) and the affiant failed to allege necessary jurisdictional facts (20 Fed. at 308). Conversely, in *Riley* v. *Colpoys*, 85 F. 2d 282 (C. A. D. C.), an affidavit of flight was held sufficient despite patent reliance of the affiant on interviews with third persons. Upon another complex set of facts concerning a violation of the Pure Food and Drug Law, an affidavit supporting a complaint was held insufficient in *United States* v. *Baumert*, 179 Fed. 735 (N. D. N. Y.); and in *United States* v. *Langsdale*, 115 F. Supp. 489 (W. D. Mo.), it affirmatively appeared that the attorney signing the complaint was quite vague as to the specific items of tax evasion, and relied inordinately upon very general statements of the defendant himself (115 F. Supp. at 491–492). In *People* v. *McLaughlin*, 243 N. Y. 417, the affidavits supporting extradition were held insufficient upon a multiplicity of grounds. While the court adverted to information and belief, the gravamen seems to have been "a profession of knowledge that is erroneous and unwarranted," charges that are "vague, indefinite and general", lack of specification of sources of information "or the grounds of belief," and omission of "a basic element of guilt"; the court conceded that "any one of these grounds of criticism, standing alone, would be inadequate" (243 N. Y. at 419–420).

> The affidavit charges that the accused did, on May 25, 1902, in Mahoning County, Ohio, unlawfully and falsely pretend to the North American Watch Company of Mansfield, Ohio, with intent to defraud said company, that he was the owner and proprietor of a dry goods store in Youngstown, Ohio, which statement was false and known by accused to be false; that by means of the said false statement he obtained from the watch company jewelry worth $400. This was sufficient under the laws of Ohio.

There is no indication that the affiant could have had direct personal knowledge of both the making of the false statement at the watch company and also of the state of the defendant's ownership of property. Nor is there any indication that the affidavit provided any details. But the court upheld the affidavit, pointing out that the statute did not require the furnishing of an indictment to the governor of the defendant's state of refuge, but permitted the alternative of an "affidavit" (126 Fed. at 329). The admonition of this Court, when the case was certified to it, against undue hampering of proceedings is, we think, as pertinent to the institution of denaturalization proceedings as to the ordering of extradition (197 U. S. at 333):

> * * * While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the

court in which he may be tried, and in no manner determines the question of guilt.

B. THE AFFIDAVIT IN THIS CASE CONTAINED SUFFICIENT STATEMENTS OF EVIDENTIARY MATTERS SHOWING GOOD CAUSE FOR DENATURALIZATION

1. Relying on the statement in *Zucca*, 351 U. S. at p. 99, that "the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship", petitioners argue that the affidavits in these cases are insufficient, even apart from the absence of personal knowledge by the affiant. "Evidentiary matter", in the context of a showing of "good cause" in an affidavit, is obviously far different from evidence necessary to prove a case at trial. But petitioners, we submit, are attempting to import the standards of trial-proof into the affidavit. While statements in the affidavits that the naturalizations of petitioners were "fraudulently and illegally procured" are only allegations of ultimate fact, the specific statements of petitioners' false oaths of non-membership in subversive organizations, together with the specification of petitioners' membership in the Communist Party at specific periods (see App., *infra*, pp. 129–132), were sufficient statements of "evidentiary matters" showing good cause for institution of the proceedings. These evidentiary matters adequately showed that the denaturalization proceedings were not being brought upon broad general charges, but on the basis of a very specific course of conduct by petitioners—membership in the Communist Party in definite years, specifically

concealed from the naturalization authorities at a particular time.

It may be true, of course, that facts evidencing an ultimate fact such as fraud are themselves, in one sense, an "ultimate fact" in relation to some lower level of evidence. But it is clearly evidence of the ultimate fact of fraud that a person knowingly and deliberately conceals membership in the Communist Party, where there is a duty to reveal that fact—even though the fact of concealment is in turn supported by proof that the person knew that he was asked the question and that he answered falsely. Similarly, the fact of membership may be supported by a variety of proof, such as that he paid dues, attended meetings, accepted orders, etc. Even these underlying facts, such as payment of dues, are, in turn supported by a lower level of evidence, *e. g.*, proof that money was turned over, receipts accepted, etc. If an affidavit of good cause must contain only those facts which do not rest on a lower degree of proof, the entire trial record would have to be summarized in advance. We think that a fact is not the less evidentiary of the ultimate, dispositive fact merely because a lower layer of evidentiary facts can and will be adduced at the trial. The "evidentiary matters" which must be included in the affidavit are simply those which show that the government has sufficient basis to move forward, not all those which will have to be proved at the trial.

2. Petitioners also seek to find support for their position by pointing out that the complaint in *Zucca* was fairly detailed; and urge that this Court must

therefore have held that still more detail must be alleged in an affidavit. The Court, however, stayed scrupulously clear of both the government's suggestion that the language of the specific complaint in *Zucca* was an adequate duplication of what an affidavit need set forth (No. 213, O. T. 1955, Gov. Br. 8, 11–12, 16, 41), and the suggestion of the respondent that the Congress "could not have intended that the courts be required to accept the second-hand statements of investigators" (No. 213, O. T. 1955, Resp. Br. 46). The Court thus refused, we think, to enter into the question whether, in that particular case, the language in the complaint would have sufficed if it had been furnished in separate affidavit form. It directed its attention, instead, to general "modern [pleading] practice" as the criterion of whether an affidavit was required when the Government itself was the source of the proceeding (351 U. S. 98–99):

> * * * [T]he Government contends, as an alternate ground for reversal, that no harm is done to the defendant because the complaint itself is verified and, therefore, accomplishes the function of the affidavit. With this we cannot agree. The complaint, under modern practice, is required merely to allege ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship [citing *United States* v. *Richmond*, 17 F. 2d 28, and *United States* v. *Salomon*, 231 Fed. 928].

The Court was concerned only with the possibility that "under modern practice" a complaint, as a gen-

eral matter, might allege "ultimate facts" sufficient as a matter of pleading but which, when the details were supplied, might prove insufficient as a matter of law.[25]

As appears from the materials set forth *supra*, pp. 51–62, the contemporary authorities cited by this Court in *Zucca* accepted as sufficient affidavits no more detailed than those here involved, and in the ensuing years the courts have accepted equivalent affidavits without question. That long-continued practice is very persuasive.

[25] The two cases cited at the end of the quotation likewise show that the Court was unconcerned with the sufficiency of what was alleged in *Zucca*, but was rather concerned with the absolute requirement that there be a separate affidavit. In both of the cited cases there could be no possible doubt of the sufficiency of the language of the affidavit—what was held to be deficient was the legal sufficiency of the basis of the action and not the statement of that basis in the affidavit. In *United States* v. *Salomon*, 231 Fed. 928 (C. A. 5), the proceeding was based solely upon the absence of a 90-day period between filing and grant of the petition for naturalization, and the court upheld dismissal because "Neither the petition nor the affidavit upon which it was based charged the commission of any fraud. * * * The affidavit upon which this suit was instituted amounted to nothing more than an assignment of error of law apparent upon the face of the naturalization proceedings." 231 Fed. at 929. Similarly, in *United States* v. *Richmond*, 17 F. 2d 28 (C. A. 3), the basis of the proceeding (a brief absence of the judge during the naturalization proceeding) was set forth in its full evidentiary detail in the affidavit; the affidavit was attacked, not upon insufficiency of detail, but because the "wrong is harmless" and not subject to relief "by said act of Congress" (17 F. 2d at 32). It was upon this basis, and not upon insufficiency of detail, that the Court of Appeals held that good cause was not shown (17 F. 2d at 32).

3. It is not a safeguard to defendants to require too detailed an affidavit. The Court pointed out in *Zucca*, 351 U. S. at 99–100, that the mere filing of a denaturalization proceeding may tarnish the defendant's reputation and damage his standing in the community. But if, at this early stage of the proceeding, there be added to the accusations of the complaint—which are still mere accusations and thus of limited injury—the whole array of not-yet-judicially-tested assertions of witnesses, documentary specifications, and repetitions and refinements of detail, the defendant is damaged far beyond any effect to be ascribed to formal pleadings.

The proper view, we repeat, is that, while an affidavit is insufficient if it is a mere statement of the ultimate fact that the defendant's naturalization was fraudulently procured, it is adequate if it states, to a degree showing good cause for a proceeding, the basic underlying matters which evidence the fraudulent intent and the illegality of the naturalization. That test is met, in the instant cases, by the statement of the defendants' false representations concerning the innocent nature of their organizational attachments, the actual memberships of the defendants in the Communist Party (the affiant specified the dates of those memberships), and the subversive nature of the Communist Party (the affiant here specified the respects in which its doctrines and conduct evidenced that nature). Nothing in the statutory language, or in the contemporary or subsequent administrative and judicial interpretations of that language, indicates that a showing of good cause for

a denaturalization proceeding is to be converted into a detailed exposition of the entire case.

II

FALSE SWEARING WITH RESPECT TO MEMBERSHIP IN AN ORGANIZATION TEACHING AND ADVOCATING "THE OVERTHROW OF EXISTING GOVERNMENT IN THIS COUNTRY" WAS A MATERIAL FALSIFICATION IN 1938 IN PROCEEDINGS UNDER THE NATIONALITY ACT OF 1906, AND A FRAUD ON THE NATURALIZATION COURT

One basis of the cancellation order entered against this petitioner on the ground of fraud and one of the bases for the order in the companion *Maisenberg* case, No. 76, was that in executing Preliminary Form A–2214 for a Petition for Naturalization in 1937, which was made a part of the proceedings culminating in their naturalization, each answered "No" to Question 28 which asked, "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?" Both petitioners first attack the legality of the judgments below on the assumption that the evidence in each case was sufficient to prove knowing membership in the Communist Party in 1938 when they executed the form and were naturalized, as well as knowing concealment of that fact. They assert that even such proof cannot support a finding of material concealment or misrepresentation in 1938 naturalization proceedings brought under the Nationality Act of 1906. In this, they are in error.

A. A FALSE ANSWER TO A MATERIAL QUESTION IS FRAUD EVEN IF A TRUE ANSWER WOULD NOT HAVE RESULTED IN DENIAL OF CITIZENSHIP

The thrust of petitioners' argument on the issue of materiality is that, even if the Communist Party was an organization teaching or advocating "the overthrow of existing government in this country" within the intendment of Question 28 on Preliminary Form A–2214 for a Petition for Naturalization (*supra,* pp. 2–4), such an inquiry was immaterial as a matter of law to their eligibility for citizenship under the Nationality Act of 1906, because, they contend, the fact that an applicant was, in 1938, a member of such a subversive organization would not *in itself* establish that he was a person who had not "behaved as a person of good moral character", nor one attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.[26] Their point is that, while the 1906 Act proscribed anarchists opposed to all organized government (see 8 U. S. C. (1934 ed.) 364, *supra,* pp. 3–4), it did not in terms bar Communist Party members or even members of organizations teaching and advocating the overthrow of government; on this assumption, petitioners conclude that Question 28, however construed, would not be material to any of the prerequisites of citizenship set forth in the 1906 Act, and that a misrepresenta-

[26] These were the statutory prerequisites for citizenship set forth in the 1906 Nationality Act (8 U. S. C. (1934 ed.) 382, *supra,* p. 3).

tion in answering that question could not constitute a valid basis for denaturalization.

This argument assumes that the issue of materiality turns on a showing that the particular question, if answered truthfully, would have itself established a bar to citizenship; and that one must wholly disregard the question's pertinency to other lines of inquiry bearing on eligibility to citizenship. The logical corollary of this position is that an applicant for citizenship may with impunity misrepresent or conceal any fact in naturalization proceedings which would not, if revealed, conclusively establish his ineligibility. We submit, however, that the problem is not the validity of a naturalization certificate issued on the basis of known facts as to Party membership; the significant point is that the naturalization court was prevented from making an adjudication on the true facts bearing on the eligibility of the petitioners because of their concealment and misrepresentation. Whether the naturalization court would have been justified in concluding that membership in an organization teaching and advocating overthrow of this government constituted *per se* a disqualification for citizenship, had t known the truth, is beside the point. If petitioners had answered Question 28 accurately, the true facts and the significance of their membership might have been explored, at that time, to determine whether it adequately established their lack of attachment to the principles of our Constitution and form of government. Had they been wrongfully denied citizenship on the basis of their truthful answers they would have had the remedy of appeal. But in falsifying their

answers as to such membership, they closed the door on pertinent inquiry and precluded intelligent appraisal of cardinal facts directly bearing on their good moral character, their attachment to the principles of the Constitution, and their disposition to the good order and happiness of the United States. Falsifications which foreclose intelligent and informed inquiry into objective facts bearing on the loyalties and fitness of the applicant for citizenship are material falsifications constituting fraud.

This proposition is clearly supported by the language of relevant parts of the 1906 Act and the regulations in force at the time of petitioners' naturalization. The Act, as amended by the Act of March 2, 1929 (45 Stat. 1512, Sec. 6 (b)), provided in pertinent part that (8 U. S. C. (1934 ed.) 382, *supra*, p. 3):

> No alien shall be admitted to citizenship unless * * * (3) during all the periods referred to in this section he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. * * *

In the section authorizing preliminary hearings in naturalization proceedings it was provided (8 U. S. C. (1934 ed.) 399a (a)):

> * * * For such purposes any such designated examiner or officer is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization * * *.

Regulations in force in 1937 and the first part of 1938, governing the scope of examination in naturalization proceedings, provided (Rule 1, Subdivision F, par. 2):

> Wherever practicable, preliminary examinations of applicants for naturalization and their witnesses will be made in person. The principal purpose of such examinations is to obtain information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law, is mentally and morally qualified for citizenship, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States. The question of possible arrests must be thoroughly covered. If the applicant has been arrested or charged with the violation of any law or ordinance, all the facts will be ascertained, including information as to whether conviction resulted. Particular attention must be given to the determination of the applicant's marital history and the whereabouts of his wife and minor children. The questions will be repeated in different form and elaborated until the examiner is satisfied the person being interrogated fully understands them. The witnesses shall be questioned to develop not only their own credibility and competency but the extent of their personal knowledge of the applicant's residence, moral character, and attachment to the principles of the Constitution. Search will be made of appropriate court and other records in

establishing the qualifications of the applicant and the witnesses.

(Rule 1, Subdivision N, par. 2):

> * * * Each petitioner and his witnesses shall be first duly sworn by the designated examiner or officer. The examination thereafter shall be thorough and courteous in manner, scrupulously fair, and free from prejudice or bias. The designated examiner or officer shall have before him at the preliminary hearing the record of the administrative examination in each case. He will not, however, be limited to the information contained in such record, but may use any material evidence or data received from other sources and may use and examine other witnesses than those produced by the petitioner. * * *[27]

The scope of inquiry in naturalization proceedings under these portions of the 1906 Act and its implementing regulations was necessarily broad, because the naturalization officers were required not only to probe the applicant's present state of mind, but also his *behavior* over a period of years preceding the hearing as a man attached to the principles of the Constitution and well disposed to the good order and happiness of the United States. Since past behavior was the evidentiary criterion of the applicant's fitness for citizenship under the 1906 statute (as it had been since the Naturalization Act of 1795, 1 Stat.

[27] These regulations may be found in the Naturalization Rules and Regulations of December 1, 1936, printed in Kansas, *U. S. Immigration, Exclusion, Deportation and Citizenship of the United States of America* (2d ed. 1940), pp. 398, 400–401. They were republished in 1938 at 8 C. F. R. (1938 ed.) 70.7 and 8 C. F. R. (1938 ed.) 70.18, respectively.

414) (see *Schneiderman* v. *United States,* 320 U. S. 118, 133–134; *United States* v. *MacIntosh,* 283 U. S. 605, 616–617), it follows that any activity bearing on the subjective fact of his attachment to the Constitution, and of his behavior as a person so attached, would be pertinent—regardless of whether revelation of the facts would have itself established a disqualification for citizenship, and regardless of whether the applicant might have neutralized the negative inferences which such revelation might imply. Rational appraisal of a man's past behavior in relation to his present state of mind demands full disclosure, and not merely disclosure of those aspects of the applicant's past conduct which are either favorable or colorless. When the applicant falsifies as to his past behavior he forecloses intelligent inquiry as to whether that behavior is consistent or inconsistent with his present qualifications for citizenship, an evaluation which is for the naturalization court, not the applicant. The test of materiality is, in short, whether the question seeks information of past behavior or current attitudes pertinent to the prerequisites of citizenship enumerated in the statute.

The fact, for example, that a person has been arrested and charged with crime in the past, though not necessarily a disqualification for citizenship, is material to the question of his past behavior as a person of good moral character. A false answer to this question has been held to constitute a fraud on the naturalization court, even though the answer, had it been truthfully given, would not have furnished a complete basis for a denial of naturalization.

United States v. *Montalbano,* 236 F. 2d 757, 759 (C. A. 3), certiorari denied *sub nom. Genovese* v. *United States,* 352 U. S. 952; *Corrado* v. *United States,* 227 F. 2d 780, 782 (C. A. 6), certiorari denied, 351 U. S. 925; *United States* v. *Ascher,* 147 F. 2d 544 (C. A. 2); *United States* v. *De Francis,* 50 F. 2d 497 (C. A. D. C.); *United States* v. *Saracino,* 43 F. 2d 76 (C. A. 3); *United States* v. *Accardo,* 113 F. Supp. 783 (D. N. J.), affirmed, 208 F. 2d 632 (C. A. 3), certiorari denied, 347 U. S. 952. The Court of Appeals for the Sixth Circuit, in the *Corrado* case, explained the rationale of this line of cases (227 F. 2d at p. 784):

> Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship. How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded citizenship in the United States exacts the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. Where fraud has been practiced by the alien in

> procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship.

False answers to questions concerning marriage (*United States* v. *Lumantes,* 139 F. Supp. 574 (N. D. Cal.), affirmed, 232 F. 2d 216 (C. A. 9)), residence (*United States* v. *Udani,* 141 F. Supp. 30 (S. D. Cal.)), and events which occurred outside the statutory period (*Stevens* v. *United States,* 190 F. 2d 880, 881 (C. A. 7)), have similarly been held to constitute material falsifications.

The same rationale plainly applies to current membership in an organization teaching and advocating the overthrow of the United States Government. Regardless of whether such membership would, in itself, conclusively prove lack of attachment (as to which see *infra,* pp. 83–90, 117–128), the fact of membership was undeniably material on the issue of attachment. See *Stasiukevich* v. *Nicolls,* 168 F. 2d 474, 479 (C. A. 1); *United States* v. *Marasilis,* 142 F. Supp. 697, 700 (W. D. Mich.). Hence, if petitioners knowingly concealed information as to their membership in the Communist Party, their falsification constituted in each case a fraud on the naturalization court which granted citizenship on the basis of that misinformation.

B. A QUESTION AS TO MEMBERSHIP IN AN ORGANIZATION ADVOCATING THE OVERTHROW OF THE GOVERNMENT WAS MATERIAL ON THE ISSUE OF ATTACHMENT TO THE PRINCIPLES OF THE CONSTITUTION, A PREREQUISITE TO CITIZENSHIP UNDER THE 1906 ACT

Since Question 28 was clearly material to the investigation of petitioners' behavior as persons attached to the principles of the Constitution of the United States and well disposed to its good order and happiness—within the meaning of Section 4 of the 1906 Act (8 U. S. C. (1934 ed.) 382)—petitioners' argument that the 1906 Act did not specify membership in an organization teaching and advocating overthrow of existing government as a disqualification for citizenship, but mentioned only anarchists by name, becomes wholly irrelevant.

1. No doubt Section 7 of the 1906 Act (8 U. S. C. (1934 ed.) 364, *supra*, pp. 3–4), which was based on Section 39 of the Act of March 3, 1903, 32 Stat. 1213, 1222, was, when enacted, intended in the main to meet the then-current problem presented by terrorist activities of anarchists, following the Chicago Haymarket riots of 1886, and the assassination of President McKinley in 1901. See *Dennis* v. *United States*, 341 U. S. 494, 562–563 (opinion of Mr. Justice Jackson). But the specific enumeration of anarchists as a class ineligible to citizenship in Section 7 of the 1906 Act, in no way suggests a limitation on the general prerequisites of citizenship, including attachment to the principles of the Constitution, enumer-

ated in Section 4 of the same Act which antedate by over a hundred years the particular restrictions set forth in Section 7.

The history of Section 4 establishes that attachment to the Constitution was regarded almost from the beginning as a fundamental requirement of citizenship and that searching inquiry into the behavior of the applicant as one so attached was considered a prerequisite to the grant. The Act of March 26, 1790 (c. 3, 1 Stat. 103), the first Naturalization Act, required an oath to support the Constitution, and a two-year residence in the United States. The latter requirement was imposed in order, first, that the alien

> 'have an opportunity of knowing the circumstances of our Government, and in consequence thereof, shall have admitted the truth of the principles we hold. Second, that he shall have acquired a taste for this kind of Government.'[28]

Further, the Naturalization Act of 1795 (c. 20, 1 Stat. 414) imposed the requirement that the alien shall have "behaved as a man * * *, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same."

That Act, as shown by the debates and the history of the period, was passed in an era of turmoil in Europe marked by overthrow of existing government in France and elsewhere, creating the fear that emigrant refugees would hold principles inconsistent with republican ideals. Accordingly, it was proposed that

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[28] Michael J. Stone, 1 Debates in Cong. (Old Series), 1789-1790, p. 1157.

an alien be required to be "attached to a Republican form of Government" in order "to prevent those poisonous communications * * * of which gentlemen were so much afraid." 4 Annals of Cong., 3d Cong., 1793–1795, p. 1021. The proposal was amended to substitute "attached to the Constitution of the United States" since the term "Republican" was equivocal and had been "assumed by many Governments in Europe, which were upon principle entirely different from ours." Some which were said to have assumed the title of "Republican" had been "Aristocracies of the most hideous form," while "many call themselves Republican, who, by this word, mean, pulling down every establishment; they were mere Anarchists." *Id,* pp. 1021–1022. One of the groups designed to be excluded from naturalization were the Jacobins, whose views were "abhorrent to the Constitution" and "who were dangerous to the country" (*Id.,* pp. 1031–1032).

The chief features of the Act of 1795 were repealed in 1798 but were again embodied in the Act of April 14, 1802, 2 Stat. 153, passed at the behest of President Jefferson. The statute provided, *inter alia:*

> That any alien * * * may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:—
>
> * * * * *
>
> Thirdly, that the court admitting such alien shall be satisfied that he has resided within the United States five years at least, * * * and it shall further appear to their satisfaction, that during that time, he has behaved as a man of a good moral character, attached to

the principles of the constitution of the United States, and well disposed to the good order and happiness of the same * * *.

In a report to the President by the Commission on Naturalization appointed under Executive Order on March 1, 1905, the Commission accepted the "principles laid down" in the 1802 Act. It regarded them as "sound and should not be changed", but recommended "additional principles" (H. Doc. No. 46, 59th Cong., 1st Sess., pp. 10–11). The House Committee on Immigration and Naturalization found that widespread frauds were being committed on naturalization courts in the form of perjury and other fraudulent practices. While the committee had no desire "to make any radical changes in the principles of existing law governing naturalization", it suggested the additional requirements that the alien must be able to understand the English language, and must intend to reside permanently in the United States (H. Rep. No. 1789, 59th Cong., 1st Sess., pp. 2–3). During floor debate in the House on the bill which became the 1906 Act, Representative Crumpacker stated that (40 Cong. Rec. 7039) "the dominant purpose of the bill under consideration is to protect American citizenship against the fraudulent naturalization of aliens, and incidentally to impose additional qualifications on the right to become a citizen" and "it provides for the cancellation of certificates of citizenship that have been procured through fraud and perjury". He also stated: "If any alien shall impose upon the court by perjured testimony * * * the bill makes the certificate invalid * * *". 40 Cong Rec.

7040. Representative Bonynge, sponsor of the bill, stated (40 Cong. Rec. 3651), "It provides a procedure for the cancellation of certificates of naturalization that may be obtained through fraud of any kind". In sum, nothing in the remote or the immediate history of the 1906 Act suggests that it was intended to change the requirement of attachment to the principles of the Constitution as a primary condition of citizenship, or to narrow the inquiry into such attachment to the single issue of whether the applicant was an anarchist—as petitioners seem to contend.

Membership in organizations inimical to our constitutional principles of government has been uniformly regarded by the courts as material under the 1906 Act. Many of the cases raising issues as to lack of attachment involved questions as to whether the organization did advocate "overthrow" or instead advocated change within the framework of the Constitution; this concern shows, in itself, the relevance of an inquiry into the applicant's membership. See *United States* v. *Olsson*, 196 Fed. 562 (W. D. Wash., 1912); *United States* v. *Swelgin*, 254 Fed. 884 (D. Ore., 1918); *United States* v. *Tapolcsanyi*, 40 F. 2d 255 (C. A. 3, 1930); *In re Seralieff*, 59 F. 2d 436 (E. D. Mo., 1932); *In re Van Lacken*, 22 F. Supp. 145 (N. D. Cal., 1938); see also *Schneiderman* v. *United States*, 320 U. S. 118, 139–147; *Ex parte Sauer*, 81 Fed. 355 (D. C. Texas, 1891); cf. *United States* v. *Kusche*, 56 F. Supp. 201, 215–216 (S. D. Cal.) (collecting cases). In *Schneiderman* v. *United States*, 320 U. S. 118, a denaturalization proceeding, this Court did not suggest that organizational member-

ship is immaterial to the question of attachment, but only, at most, that the government cannot establish lack of attachment on the basis of such organizational membership alone. And since the *Schneiderman* case, the courts have uniformly recognized that the question of communist membership was material to the issue of attachment to the principles of the Constitution under the 1906 Act (*Stasiukevich* v. *Nicoles,* 168 F. 2d 474 (C. A. 1); *United States* v. *Matles,* 150 F. Supp. 85 (E. D. N. Y.); *United States* v. *Marasilis,* 142 F. Supp. 697 (W. D. Mich.)), as well as to the issue of membership in an organization which believes in, advises, advocates, or teaches the overthrow by force or violence of the government of the United States under the Nationality Act of 1940, 8 U. S. C. (1946 ed.) 705. *Sweet* v. *United States,* 211 F. 2d 118 (C. A. 6), certiorari denied, 348 U. S. 817. In *Matles* and *Marasilis,* as in the instant cases, the fraud found was a false answer to Question 28, in the Preliminary Form for Petition for Naturalization, by Communist Party members. We know of no decision involving naturalization under the 1906 Act which suggests that the question of whether one belongs to an organization teaching and advocating the overthrow of this government would be immaterial on the issue of his attachment to the Constitution.

2. Petitioners also seek support for their contention that Question 28 was immaterial to naturalization in 1938, in the fact that, while the various deportation and exclusion laws have since the Immigration Act of March 3, 1903 (Sec. 2, c. 1012, 32 Stat. 1213) specifically adopted the standard of "advocacy of overthrow

of the government of the United States", the naturalization laws failed to include such advocacy as a disability (in addition to the specific proscription against anarchy) until 1940. But this specific enumeration in the exclusion and deportation laws does not suggest that membership in an organization teaching and advocating the overthrow of existing government is immaterial to an inquiry, under the 1906 Act, into the naturalization applicant's behavior as one attached to the principles of the Constitution. As we have pointed out (*supra*, pp. 77–88), the primary standards of admission to citizenship, which have remained essentially unchanged since 1795, are broad enough to comprehend any conduct of the applicant which bears on his good morals, his attachment to the principles of the Constitution, and his disposition to the good order and happiness of the nation. The breadth of these criteria were not narrowed in 1906 simply because Congress saw fit to mention one special class of political undesirables (anarchists), or because later Congresses expanded our exclusion and deportation legislation.

Indeed, the Congressional recognition that membership in certain organizations constitutes an evil sufficient to warrant the exclusion or deportation of aliens suggests, at the least, the *materiality* of a similar inquiry in naturalization proceedings where standards of conduct, behavior, and belief are at issue. Exclusion and deportation provisions must be considered relevant to the statutory criteria for citizenship since it can hardly be supposed, as petitioners seem to urge, that Congress intended that citizenship must neces-

sarily be granted to aliens whom Congress thought unfit for continued residence. Cf. *United States* v. *Thind*, 261 U. S. 204, 215. It is true that the test of whether an applicant has shown through his behavior an attachment to the principles of the Constitution is "an elastic test" (*Schneiderman* v. *United States*, *supra*, 320 U. S. 118, 139) which is concerned with the qualifications of individuals for citizenship, rather than with the desirability of admitting or excluding a particular group or class of aliens. Nevertheless, the fact that Congress has, in adopting its immigration laws, selected certain groups as constituting a particular danger to this country does have a bearing on the issue of individual qualifications for citizenship. Membership in a group is certainly *relevant* to individual fitness for citizenship, particularly where it can be shown that the individual is identified in every important respect with the group aims which led Congress to exclude or deport the group as a class. The naturalization court has the right, if not the duty, to ascertain whether the applicant's past behavior in this country in an alien status was of the character proscribed in the Immigration Act, and the fact of membership in a group identified in the immigration laws as undesirable would have a special relevance to the issue of his past behavior as an individual, even if that fact might prove innocuous after full investigation. *United States* v. *Chandler*, 152 F. Supp. 169, 178 (D. Md.). Certainly, the fact that an individual personally adopted and advocated doctrines found so inimical to the country as to warrant deportation would be a relevant consideration.

III

THE EVIDENCE OF FRAUD IN ANSWERING QUESTION 28 WAS CLEAR, UNEQUIVOCAL, AND CONVINCING

A. PETITIONER KNEW THAT HE WAS REQUIRED TO INDICATE HIS COMMUNIST PARTY MEMBERSHIP IN RESPONSE TO THIS QUESTION

Petitioner also contends that Question 28 appearing on his Preliminary Form for Naturalization (*i. e.*, "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?") is susceptible of two interpretations:—(*a*) that the question concerned membership in an anarchistic group alone, or (*b*) that it concerned membership in either (1) an organization teaching and advocating anarchy or (2) an organization teaching and advocating "the overthrow of existing government in this country." The argument is that, as a matter of law, the question is ambiguous and therefore cannot be a valid basis for the finding of misrepresentation in the answer.

The two categories of membership in Question 28 are, however, plainly enumerated in the disjunctive. As a matter of elementary grammar, the question cannot be construed to refer only to members of one kind of organization (*i. e.* anarchist organizations). The phrase "any organization which teaches or advocates anarchy *or* the overthrow of existing government in this country" means on its face an organization which teaches or advocates one of two things, (1) anarchy, *or* (2) the overthrow of existing govern-

ment in this country. See *United States* v. *Stuppiello*, 260 Fed. 483 (W. D. N. Y.).

Moreover, the question cannot be considered in the abstract. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 412–413. By 1937, when petitioner was called upon to answer Question 28, the immigration laws had for years covered, under phraseology not too different from Question 28, aliens "who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law." See Section 1 of the Act of October 16, 1918, 40 Stat. 1012. It was well known that this language had been applied in several instances to Communist Party members, as well as to anarchists. See *Kjar* v. *Doak*, 61 F. 2d 566 (C. A. 7); *Jurgens* v. *Seaman*, 25 F. 2d 35 (C. A. 8); *United States ex rel. Vojewvic* v. *Curran*, 11 F. 2d 683 (C. A. 2); *Antolish* v. *Paul*, 283 Fed. 957 (C. A. 7); *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1); *United States ex rel. Abern* v. *Wallis*, 268 Fed. 413 (S. D. N. Y.).[29] It was certainly clear that the government had been charging that the Communist Party was an organization which advocated violent overthrow.[30] Petitioner, who was an important functionary in the

[29] See, also, Kansas, *op. cit.*, pp. 149–165 (collecting cases).

[30] Deportation proceedings against Harry Bridges for belonging to an organization advocating violent overthrow, *i. e.*, the Communist Party, were begun in 1938. *Bridges* v. *Wixon*, 326 U. S. 135, 137. The similar deportation proceedings which culminated in *Kessler* v. *Strecker*, 307 U. S. 22, had been begun in 1933; and in the 1930's a substantial number of warrants of deportation had been issued on that ground.

Party, and an intelligent man, could hardly have been unaware of those facts. The trial judge, therefore, was justified in finding that petitioner knew that Question 28 called for disclosure of Communist Party membership and deliberately concealed that fact.[31] The evidence that petitioner had been a significant functionary in the Party well indoctrinated in Communist principles, including the principle of maintaining his membership secret from official notice (see the Statement, *supra,* pp. 11–21, and *infra,* pp. 94–96, 105–108), strongly supports the conclusion that he intended to falsify his answer, and thus to perpetrate a fraud on the court in its inquiry into his fitness for citizenship. Cf. *American Communications Association* v. *Douds,* 339 U. S. 382, 412.

B. THERE WAS AN ABUNDANCE OF EVIDENCE TO ESTABLISH PETITIONER'S MEMBERSHIP IN THE COMMUNIST PARTY

Petitioner prefaces his discussion of the evidence by discussing several factors which he apparently

[31] Following the Act of March 2, 1929 (45 Stat. 1515), amending the rule-making power of Section 28 of the 1906 Act to include "such changes in the forms proscribed by section 27 of this Act as may be necessary," Rule 3, Subdivision B of the Naturalization Rules and Regulations was promulgated on December 1, 1936, providing for the use "by clerks of courts having naturalization jurisdiction, in the exercise of such jurisdiction" of Form A 22J4 ("Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization") in addition to other forms (see Kansas, *op cit.*, p. 403). Rule 7, Subdivision A, required each prospective petitioner for citizenship "to fill out properly, sign and forward" this form "to the appropriate district * * *." This form contained Question 28.

feels make the considerable body of unrebutted evidence against him less credible. Among these are the time-interval between his naturalization and the cancellation proceedings; the asserted difference in attitude toward the Communist Party in 1937–1939 and 1952; and the fact that criminal proceedings instituted against him in 1942 for false swearing in his naturalization proceeding were dismissed by the government without trial. He then concedes, as he must, that neither in the trial court nor in his brief in the Court of Appeals did he contest the sufficiency of the evidence as to his membership in the Communist Party, and that now he is asking this Court for the first time to appraise the government's unrebutted evidence on this issue. Although he does not make a similar concession in regard to the proof that the Communist Party did teach or advocate the violent overthrow of the government, the fact is that he failed also to attack the sufficiency of this evidence either in the trial court (see Tr. 1222–1224) or in the Court of Appeals. The only challenge to the evidence which was preserved in his petition for certiorari to this Court was the sufficiency of the evidence to show his knowledge of the aims and objectives of the Communist Party at the time he, as a member of the Party, procured his naturalization.[32]

His present attack on the membership finding is hardly more than a statement that this Court should not credit the testimony of the eight witnesses who

[32] For the reasons stated in our brief in No. 76 (see Govt. M. Br. pp. 18–20), we do not think the sufficiency issue is before the Court in that case.

positively identified him, not only as a member of the Party from 1935 to at least 1943 or 1944, but as an important functionary who met in inner-council meetings with high Communist Party officials on questions of Party policy. We have summarized in some detail in the Statement (*supra*, pp. 11–21) the testimony of the eight witnesses who described petitioner's activities in the Communist Party from 1935 through the middle 1940's. A very brief recapitulation will suffice to show the invalidity of his belated challenge to the evidence. Witness Nowell, who himself held many high posts in the Communist Party, described petitioner's induction into the Party in the late summer or early fall of 1935. Nowell and the other seven witnesses testified to a large number of closed Party meetings which petitioner attended during at least the next eight years; unit meetings where he was the speaker (Eager); District Bureau meetings (Budenz); closed fraction meetings of union delegates who were Party members in connection with the union infiltration program of the Party (Fountain, Eager, Reno); closed meetings in Detroit with the highest officers of the National Party (Budenz, Fountain, Rataj, Herbster); meetings of the National Committee of the Communist Party in New York (Budenz, Reno); meetings with the Politburo of that Committee (Budenz); attendance at a statewide Communist Convention (Fountain, Herbster). Some of the witnesses testified that Party dues were collected from petitioner at Communist meetings and receipt stamps were given to him which he pasted in his Party book (Eager, Hewitt, Reno). The witnesses also testi-

fied that petitioner was a secret member during their acquaintance with him, and while he was attached to a Party unit as a convenience he was in the status of a member-at-large responsible, in his role as a "mass leader", only to the District Office or the National Committee of the Communist Party (Nowell, Hewitt, Reno).[33] Petitioner was actively engaged in building up Communist membership in labor units in Detroit (Budenz, Fountain, Eager, Reno, Rataj, Herbster), and was a lecturer in a Communist Party school for new recruits on Party strategy in the trade union movement (Fountain).

However relevant the dulling effect of the passage of time might be in those cases where proof of Communist Party membership is predicated on equivocal testimony, the memory of a single witness, or evidence showing less than a complete assimilation of the defendant into the activities and program of the Communist Party—this is not such a case. With respect to petitioner, the evidence of membership is undoubtedly clear, convincing, and unequivocal.

[33] During the period that petitioner was a Michigan State Senator, his membership in the Communist Party was kept secret (Hewitt). After petitioner's election to that position, Reno saw him at a closed meeting of the National Committee in New York in December 1938 which met with Communist representatives of the Michigan District to discuss the 1938 elections and the activities of the Communist Party in 1939. Reno later saw him at a similar joint meeting held to discuss the assignment of Communist functionaries in the Michigan District of the Party. Budenz corroborated this testimony, and in addition testified as to petitioner's attendance at National Committee and Politburo meetings in the 1940's.

C. THE EVIDENCE ESTABLISHED THAT THE COMMUNIST PARTY WAS AN ORGANIZATION TEACHING AND ADVOCATING THE OVERTHROW OF THE UNITED STATES GOVERNMENT, AND NO CONSTITUTIONAL RIGHTS WERE INFRINGED BY THAT FINDING

1. Petitioner now challenges the sufficiency of the evidence to prove that the Communist Party was an organization teaching or advocating the overthrow of the United States Government at the time of and in the several years prior to his naturalization. As we have noted (*supra*, p. 94), this issue is now raised for the first time in the course of appeal.[34] The belated argument seems to be prompted by a misapplication of this Court's recent decision in *Yates* v. *United States*, 354 U. S. 298, involving the different issue of the individual criminal guilt of defendants charged with conspiring, in violation of the Smith Act, to teach the duty and necessity of overthrowing the Government of the United States by force and violence, from 1945 to 1951. The judgments against those defendants were reversed on the basis, in part, of the trial court's failure to draw the statutory distinction between advocacy in the sense of preaching abstractly the forcible overthrow of the government and advocacy which includes the "urging", "necessity" and "duty" of forcible overthrow (354 U. S.

[34] Nowak stated in his brief in the Court of Appeals (p. 44), "However, it is not necessary that we argue nor is there any necessity for a determination here of what the teaching and advocacy of the Party was in 1938. For, we have seen, what is important is Appellant's knowledge and understanding of the program and advocacy of the Party."

at 324)—a distinction validly drawn (see 354 U. S. at 326) in *Dennis* v. *United States*, 341 U. S. 494.

Here, where the issue is the character of the Communist Party in 1937–1938 in the context of a naturalization inquiry, rather than the individual *criminal* guilt of the petitioner for past actions, a far different problem is presented. The character of the Communist Party is material, as we have shown (*supra*, pp. 76–91), because of its pertinency (taken together with petitioner's knowledge of the Party's character) to the issue of his attachment to the principles of the Constitution and the truthfulness of his answer to Question 28 which refers to an organization teaching or advocating "the overthrow of existing government in this country." For these particular issues, there is neither statutory nor constitutional need to show that the Communist Party, in teaching or advocating the overthrow of this government, urged and promoted a concrete plan of action looking to such overthrow (although we think this record is sufficient to support even the Smith Act definition of advocacy). It is enough to show that the Party taught or advocated the overthrow of our government, in the normal sense in which those words are customarily used.[35] See also *infra*, pp. 102–105.

2. The evidence in this record firmly establishes

[35] That is the sense in which the words were used in Question 28 and under the 1918–1950 deportation laws prescribing the expulsion of aliens belonging to organizations advocating overthrow. See, *e. g.*, *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Kessler* v. *Strecker*, 307 U. S. 22; *Vajtauer* v. *Commissioner*, 273 U. S. 103.

that the Communist Party both taught and advocated the overthrow of existing government during the period in question (1937–1938). There is the testimony of two expert witnesses, Nowell and Baxter, and documents, consisting of the Party "classics" and various communist publications, either published during the relevant time period or otherwise in use during that period.[36] In addition to this evidence, much of the testimony as to petitioner's own statements of his understanding of the Party's aims and purposes, which we advert to in the next section of our argument (*infra*, pp. 105–108), is also germane to this issue. In this portion of the brief, we confine our discussion to the testimony of the two expert witnesses.

Witness Nowell (see *supra*, pp. 16–17, 21–25), in addition to holding positions of importance in the Party, was extensively educated in the strategy and tactics of the Communist Party and the parent organization, the Communist International. He attended the District Communist School in Detroit in 1930 and later the International Lenin School (the Lenin Institute) in Moscow, Russia, in 1931 and 1932—a school described by Earl Browder as one "devoted to training professional revolutionaries for leadership for all sections of the Communist International." In Moscow, Nowell was taught by members of the Red Army and others, not only the theoretical necessity of over-

[36] In Maisenberg's case, the evidence consists of the stipulated testimony of expert witnesses John Lautner and Frank Meyer in addition to the documentary evidence also admitted in evidence in Nowak's case.

throwing the capitalistic system, but also the methods to be employed to promote civil war, and military tactics to be used in civil war for the purpose of overthrowing the American government. The students were also taught that the Communist Party was a section of the Communist International and that its directives were a guide to the revolution in the United States which would be patterned on that of the Russian Revolution; that the ultimate objectives of the Communist Party "were to overthrow the government of the United States" and establish the dictatorship of the proletariat fashioned after the Soviet system in Russia. On his return to the United States, Nowell became the director of and an instructor in the District Workers' School where he taught what he had learned at the Moscow school, as well as material sent him by the Central Committee and the Communist International, and the basic Communist literature of the Party (Gov. Exs. 3–A to 3–N). Nowell testified that during his membership in the Party (1929 to the end of 1936) its aim and purpose was to organize the thinking of various segments of the population, particularly labor, along Communist lines, and to direct them in accordance with Communist strategy to "overthrowing the government of the United States" and "establishing of the dictatorship of the proletariat in accordance with the Soviet form of government." This, he said, would come about only through the violent destruction and dismemberment of this government.

Witness Baxter (see *supra*, pp. 25–27) also held many offices in the Party at the district level during the period of his membership (1927–1945). He was

selected to attend the Lenin Institute in Moscow, by the Red International of Labor Unions and the National Central Committee of the Communist Party. He studied there in 1929 and 1930 at the expense of the Russian government. He also was taught by Russian instructors and officers of the Red Army the basic theoretical courses in Communism and the actual methods of conducting illegal work, insurrectionary measures to be used at certain times, and instruction in firearms. He was taught that the American Communist Party was a section of the International, and that the objective of the American Communist Party was the overthrow of the United States Government as the political representative of the capitalistic class, and that this was to be accomplished only when the demand of the masses for a change had been created, and when the Party leadership decided that the time for insurrection and the arming of the working classes had arrived. Baxter taught these ideas at various Party schools from 1932 to 1941, including the principle of overthrow, and he identified certain of the Communist "classics" stating this principle as being in use through 1938. He testified that the theory of peaceful change had no validity in Communist theory, and in the various Party literature in use through 1939. Baxter testified that, while Communist tactics varied during his membership, the ultimate objective of forceful overthrow of the United States by force of arms did not.

3, Petitioner now contends for the first time that the trial court predicated its conclusion that he had

been a member of an organization teaching or advocating the overthrow of existing government in this country, within the meaning of Question 28, on a general finding that the aims and purposes of the Communist Party included the overthrow of the United States Government, rather than on a specific finding that the Communist Party had in fact taught and advocated overthrow of the government. On this premise, he argues that he is deprived of First Amendment rights because, he says, the character of the Party is made to depend merely on its espousal of beliefs rather than on advocacy of concrete action calculated to bring about the violent overthrow of the government.

Even if this argument is within the scope of the grant of the writ of certiorari in this case, it misinterprets the trial court's findings. The court based its finding of fraud (as to Question 28) on the allegation in the Nowak complaint that petitioner denied Communist Party membership in his Preliminary Form (N. App. 25)" "when in fact he was a member of the Communist Party with knowledge that it taught and advocated such violent overthrow of this government." The gist of its conclusions of law was that (N. App. 32):

> Defendant admittedly answered question No. 28 in his preliminary petition denying that he was a member of any organization that advocated overthrow of this government. Therefore, since at the time defendant petitioned for naturalization the Communist Party had been held to be and was an organization advocating

> the overthrow of this government by force and violence (United States v. Curran, 11 F. 2d 683; Jurgans v. Seaman, 25 F. 2d 35; Antolish v. Paul, 283 F. 957; Skeffington v. Katzeff, 277 F. 129; United States v. Wallis, 268 F. 413; Kjar v. Doak, 61 F. 2d 566) a fact well known to defendant, we conclude that defendant by answering question No. 28 in the negative intentionally concealed his membership in the Communist Party of the United States. *Therefore this Court holds that proof of those facts constitutes ground for cancellation of his citizenship.* He was not then a person "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." [Emphasis added.]

The court's reference to the aims and purposes of the Party obviously meant those aims and purposes which were communicated to its membership through teaching and the other forms of communication encompassed in "advocacy".

Moreover, petitioner again misconceives the basic issue in this case. The problem is not whether naturalization could have been denied in the first instance for membership in the Communist Party. The issue is, rather, whether the citizenship of one who falsely and intentionally answered a relevant question can be cancelled. As we have stressed, the proof of petitioner's membership was material in his naturalization proceeding, not to establish the fact that either the individual or the Communist Party engaged in crimi-

nal acts,[37] but on the issue of his behavior as a person attached to the principles of the Constitution. Whether the Communist Party's advocacy was merely as to the propriety of overthrowing governments violently or whether its advocacy constituted a call to action, Question 28 was still relevant on the issue of petitioner's attachment to the principles of the Constitution and should have been answered truthfully. Therefore, the First Amendment considerations raised in the Smith Act cases, where criminal sanctions cannot be imposed on persons whose advocacy involves merely the expression of abstract ideas, have no relevance here. Petitioner is not being prosecuted for belonging to an organization or for the expression of ideas. The question is whether he misrepresented facts material to the naturalization court's investigation of his fitness for citizenship under the criteria set forth in the 1906 Act, which included past behavior as a person attached to the principles of the Constitution. In this respect, the beliefs of an applicant for citizenship, and of the organization about which he is asked, are material in naturalization proceedings—however irrelevant mere belief may be in Smith Act prosecutions. The First Amendment does not forbid asking a citizenship-applicant whether he believes (or an organization of which he is a member believes) in the violent overthrow of the government. That is a relevant and proper inquiry to make of one who seeks the

[37] Cf. *Dennis* v. *United States*, 341 U. S. 494; and *Yates* v. *United States*, 354 U. S. 298, for the *criminal* standards.

privilege of naturalization. Cf. *Girouard* v. *United States*, 328 U. S. 61, 63, 69.

Nor can petitioner seriously urge that the First Amendment permits falsification of any material fact in naturalization proceedings; this Court has stated that it had "no doubt of the power of Congress to provide for denaturalization on the ground of fraud." *Knauer* v. *United States*, 328 U. S. 654, 673. Whether or not the naturalization court, had it known the truth, would have denied the application on some basis inconsistent with First Amendment rights is not, therefore, properly at issue in these proceedings. As this Court said in *Kay* v. *United States*, 303 U. S. 1, 6, "When one undertakes to cheat the Government or mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

D. THE EVIDENCE OF PETITIONER'S KNOWLEDGE THAT THE COMMUNIST PARTY WAS AN ORGANIZATION TEACHING OR ADVOCATING THE OVERTHROW OF THE GOVERNMENT IS CLEAR, UNEQUIVOCAL, AND CONVINCING

The evidence as to petitioner's knowledge of the aims and purposes which the Communist Party taught and advocated during the period of his membership is likewise clear, unequivocal, and convincing. At the very meeting when he joined the Party in the late summer or fall of 1935, he told those attending that he agreed with the Communist Party and the International to which he pledged his allegiance, that it

would be necessary to "destroy" capitalism in order to set up a government of the workers (witness Nowell, *supra*, p. 17). About 1937, petitioner told a closed unit meeting on two occasions that the Party could not rely entirely on ballots in this country to obtain a Soviet America, and on one occasion he told the members that the gaining of the Party's objectives "would eventually resolve to bullets" (witness Eager, *supra*, pp. 15–16). In the summer months of 1937, when petitioner lectured as an instructor in a Communist Party school for new recruits on the subject of the relation of the Party to the trade union movement, he told the class that if the Communist Party could not gain control of the unions through union elections "then it may be necessary to use violence to get it, to win control for the Communist Party and the Communist System," and that "the goal of all this activity was to extend the Soviet system around the face of the earth" (witness Fountain, *supra*, pp. 13–14).

Aside from these specific statements, the evidence demonstrates that, for most of the period of his membership, petitioner was an active functionary, and a participant in Communist councils at the district and national level which made policy decisions. See the Statement, *supra*, pp. 11–21, and the discussion *supra*, pp. 95–96. From this role and his role as a Party teacher, the inference would be amply justified, even without the evidence of his own statements, that he knew that the Party taught and advocated the violent overthrow of this government. Petitioner was no "innocent." Moreover, this was 1937, not 1927, and we are not here, as in *Schneider-*

man, faced with equivocal preachments (see *supra*, pp. 97–105) or something less than a definite statement of the Party's advocacy of violent overthrow.[38] The 1935 organization manual of the Party (*The Communist Party—A Manual on Organization*, by J. Peters) which was in use during the period of petitioner's membership (according to Nowell), forbade the questioning of Party policy (*ibid.*, pp. 26–29), including its expressly stated basic objective of violent overthrow (*ibid.*, pp. 8–10).[39]

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[38] On the *Schneiderman* case, see the discussion, *infra*, pp. 120–123.

[39] The manual states:

"THE ROLE AND AIM OF THE COMMUNIST PARTY

"As the leader and organizer of the proletariat, the Communist Party of the U. S. A. leads the working class in the fight for the revolutionary overthrow of capitalism, for the establishment of the dictatorship of the proletariat, for the establishment of a Socialist Soviet Republic in the United States, for the complete abolition of classes, for the establishment of socialism, the first stage of the classless Communist society.

"Our Party realizes that certain conditions must exist before the outworn capitalist system can be overthrown.

"What are the conditions? Comrade Lenin, in his pamphlet, *'Left-Wing' Communism: An Infantile Disorder*, answers this question.

"'* * * for revolution it is essential, first, that a majority of the workers (or at least a majority of the class-conscious, thinking, politically active workers) should fully understand the necessity for revolution and be ready to sacrifice their lives for it; secondly, that the ruling classes be in a state of governmental crisis which draws even the most backward masses into politics, * * * weakens the government and makes it possible for the revolutionaries to overthrow it rapidly.' (Little Lenin Library, Vol. 20, p. 65.)

"These two conditions alone are not sufficient for the successful struggle of the working class. Even if the masses know that

This body of evidence establishes petitioner's knowledge that the Party both taught and advocated the violent overthrow of our government when he answered Question 28. By the same token, this evidence also supports the finding that, in answering the question, petitioner deliberately and intentionally falsified in order to conceal highly material facts from the naturalization court. Both of these issues, which depend largely on "the outward manifestations of state of mind" (*American Communications Ass'n. v. Douds*, 339 U. S. 382, 411), have, we submit, been proved by clear, convincing, and unequivocal evidence.

E. THE CONTENTION THAT PETITIONER WAS ERRONEOUSLY DENIED ACCESS TO A STATEMENT AND GRAND JURY TESTIMONY OF WITNESSES GIVEN IN A PREVIOUS CRIMINAL CASE IS NOT WITHIN THE GRANT OF THE WRIT OF CERTIORARI, AND IN ANY EVENT HAS NO VALIDITY

Petitioner seeks to inject the additional issue of whether he was erroneously denied access to (1) a statement allegedly given in 1940 by the witness Eager

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socialism liberates the working class, even if the masses know that socialism can be won only through revolution, unless there is a strongly organized Communist Party which explains the aims and methods of the struggle to the workers, unless it itself organizes these struggles, and is itself in the forefront of them, the revolution cannot be victorious. * * *

* * * * *

"How will the Communist Party convince the majority of the working class that a revolution is necessary? The Communist Party can do this by becoming the trusted vanguard, the beloved organizer and leader of the struggle of the working class. Agitation and propaganda alone are insufficient. Something more is needed to convince the masses of the proletariat of the necessity for the overthrow of the old order."

to the Immigration and Naturalization Service or the F. B. I. concerning petitioner, in which Eager allegedly had failed to mention certain remarks which he attributed to petitioner while testifying in this trial, and (2) the grand jury transcript of the witness Nowell's testimony given in a 1942 grand jury proceeding which had indicted petitioner for perjury involving his naturalization (which prosecution was later dismissed before trial).

We submit first that this issue is not before this Court since it was not raised in the petition for certiorari nor even adverted to as an issue in this case. Neither was it raised in the Court of Appeals which therefore had no opportunity to pass on it. Under established precedents, it should not be considered here. See, e. g., *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303. The contention is in any event misconceived.

1. During cross-examination of the witness Eager, he testified that he had answered certain questions of either immigration or F. B. I. officers in 1940 (Tr. 346–347, 351–352), but he could not remember signing any written statement (Tr. 347, 352). After Eager had so testified, defense counsel moved for the production of a written record or report of his answers, for the sole purpose of showing a variation between his answers given in 1940 to the government officers and sworn testimony he gave to a Committee of the House of Representatives in November 1938 (Tr. 348).[40]

[40] Petitioner transposes in his brief (N. Br. 95–96) the dates when the witness talked with government officers (1940) and the date he testified before the Committee (November 1938) and refers to the former as having been given "when his recol-

Defense counsel specifically stated that he wanted to show that petitioner had not given full information on some points to the House Committee in November 1938, even though conceding that the witness had stated he was not asked the particular questions. The court pointed out that this would not establish a discrepancy between the witness's 1938 and his 1940 statements since there was no showing that he would have volunteered statements in 1938 before the House Committee concerning which he was not specifically questioned (Tr. 349–350). Government counsel then told the court that he not only did not have the 1940 statement but that he had never seen it (Tr. 350–351), and the court concluded the issue by stating (Tr. 351) "He hasn't got it, anyway". Defense counsel did not press the matter further. He did, however, question the witness as to his testimony concerning petitioner before the House Un-American Activities Committee, given on November 17, 1938, a transcript of which defense counsel had in his possession (Tr. 368–372).

It is evident that, even if the issue were open for review here, the record does not establish any withholding of a contemporaneous report given by a government witness as to events to which he testified at the trial, within the rule announced in *Jencks* v. *United States*, 353 U. S. 657. First, there is nothing in the record to indicate that a record of the witness'

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lection was obviously fresher". Since his testimony before the Committee in November 1938 was "obviously fresher", petitioner has distorted the issue to some extent in view of the fact that he was in possession of the 1938 transcript at the trial.

answers given either to immigration officers or F. B. I. agents in 1940 was in existence at the time of trial—the government counsel told the court that he did not have any such record and had not seen it. The matter was on that basis closed. Secondly, unlike the *Jencks* situation, defense counsel had a transcript of the witness' testimony given in November 1938, analogous to the contemporaneous report, which was denied the petitioner in the *Jencks* case. Thirdly, defense counsel in this case did not seek the alleged written report given in 1940 to impeach the witness' trial testimony as in *Jencks,* but only to establish the fact that the witness' statement may have been more detailed in 1940 than in 1938. No discrepancy was alleged. Fourthly, counsel did not press for the report after being told that government counsel had never seen one. Thus, this case presents no issue similar to *Jencks* and no wrongful withholding of a contemporaneous statement of a prosecution witness which had possible value for impeachment purposes on the trial or to develop inconsistencies in the trial testimony. The case does not come within the *Jencks* rationale in any respect.[41]

2. Petitioner also complains of the refusal by the trial court to allow defense counsel to inspect a grand jury transcript of witness Nowell's testimony given in 1942 in a criminal case against petitioner which was later dropped. The court deferred ruling

[41] For these reasons, we believe it unnecessary to discuss whether the *Jencks* rule applies to denaturalization proceedings, which are civil and not criminal.

on this request, but stated that, in view of the number of grand juries before which the witness had testified (Nowell was used as an expert witness on the Communist Party), the court would, in fairness to the witness, allow him to refresh his memory as to what he said to the particular grand jury, and then defense counsel could question him as to what he had told that grand jury in 1942. The court stated that, if defense counsel in further questioning established any discrepancy in the witness' testimony, then the court would look at the grand jury record and if a discrepancy in fact existed he would then give the record to defense counsel to allow him to question the witness further concerning it. The court pointed out that it would not be fair to ask the witness what he had told the grand jury without giving him an opportunity to look it over (Tr. 507–510). Defense counsel then stated (Tr. 510), "Well, perhaps we can get along that way. * * * Shall we have the witness do that right now? Might as well." It was then agreed between the parties that the witness would be given an opportunity to review his 1942 grand jury testimony (Tr. 510–511). The court observed (Tr. 511), "If this man makes a mis-statement, the court is as interested in finding it out as anybody".

When the witness was recalled, defense counsel pointed out two claimed inconsistencies in the witnesses' testimony (Tr. 1132–1134) and the court then took an intermission to examine the 1942 grand jury record on those points (Tr. 1135), after which he announced what the witness' testimony to the grand

jury on those points had been (Tr. 1135–1139). Defense counsel then further cross-questioned the witness generally (Tr. 1139–1202) and also in minute detail with reference to what he had told the grand jury in 1942 (Tr. 1143–1166). On defense counsel's request at one point, part of the grand jury transcript relating to the first meeting between Nowell and petitioner was read into the record (Tr. 1145–1146). No further objection was made, at any time, to the procedure which was followed.

The procedure to be followed where a demand for a grand jury transcript is made during a trial is governed by Rule 6 (e), F. R. Crim. P., and not by the rule enunciated in this Court's *Jencks* holding.[42]

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[42] Rule 6 (e) provides:

"SECRECY OF PROCEEDINGS AND DISCLOSURE

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *"

The Notes of the Advisory Committee on the Rules (18 U. S. C. A., F. R. Crim. P., p. 126) explain this rule as follows:

"Note to Subdivision (e): 1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure, *Schmidt* v.

Under this rule (which *Jencks* did not qualify) the issue of whether a grand jury transcript, or parts thereof, should be turned over to a defendant at the trial—whether for purposes of impeaching a trial witness or to attack the legitimacy of the grand jury proceedings themselves—lies in the discretion of the trial judge who may view them *in camera* to weigh the reasonableness of the demand against the countervailing policy of keeping such records secret. *Costello* v. *United States*, 350 U. S. 359; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502, 507 (C. A. 2), certiorari denied *sub nom. Rosenblum* v. *United States*, 352 U. S. 969 (Jan. 14, 1957); *Herzog* v. *United States*, 226 F. 2d 561, 566–567 (C. A. 9); *United States* v. *Cohen*, 177 F. 2d 523, 525 (C. A. 2), certiorari denied, 339 U. S. 914; *United States* v. *Alper*, 156 F. 2d 222, 226 (C. A. 2); *United States* v.

United States, 115 F. 2d 394, C. C. A. 6th; *United States* v. *American Medical Association*, 26 F. Supp. 429, D. C.; Cf. *Atwell* v. *United States*, 162 F. 97, C. C. A. 4th; and see 18 U. S. C. A. former § 554 (a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring). Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice.

"2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

* * * * *

Smyth, 104 F. Supp. 279, 281 (N. D. Cal.); and see Comment, 47 Mich. L. R. 418.

This aim of Rule 6 (e), to leave the disposition of grand jury records to the discretion of the trial judge, is made clear by the citation by the Advisory Committee (see fn. 42, *supra,* pp. 113–114) of *Schmidt* v. *United States,* 115 F. 2d 394 (C. A. 6), where the Court of Appeals for the Sixth Circuit said (at p. 397):

> It follows that the public interest in maintaining the secrecy of the grand jurors' deliberations and the interest of the accused in exposing them may often be in direct conflict. The responsibility of evaluating these conflicting considerations in the interest of truth and justice is a delicate one. It is unthinkable that the decision should be left to the bias of an accused or his counsel, or to the inexperience of a juror. Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its "judicial inquiry." *Cobbledick* v. *United States,* 309 U. S. 323, 327, 60 S. Ct. 540, 84 L. Ed. 783; *Hale* v. *Henkel,* 201 U. S. 43, 66, 26 S. Ct. 370, 50 L. Ed. 652. It is a matter which appeals to the discretion of the court when brought to its attention. This has long been the practice and we think it is sound procedural law. *Chadwick* v. *United States,* 6 Cir., 141 F. 225, 235; *McKinney* v. *United States, supra; Grace* v. *United States,* 5 Cir., 4 F. 2d 658; *Murdick* v. *United States,* 8 Cir., 15 F. 2d 965, 968; *Cox et al.* v. *Vaught, Judge,* 10 Cir., 52 F.

2d 562; *United States* v. *American Medical Ass'n., supra; In re Grand Jury Proceedings,* D. C., 4 F. Supp. 283.

In *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, this Court said (at p. 234):

> * * * Since there is no inexorable rule which under all circumstances entitles the witness and his counsel to see the prior statement made under oath and since in this case the court itself examined and thus directly controlled the use of the grand jury testimony, we cannot say that the refusal to make it available to counsel for the defense is *per se* reversible error. To hold that it was error in the instances here under review would be to find abuse of discretion, where in fact we conclude from the entire record on this phase of the case that the judge supervised the procedure with commendable fairness. In sum, the selective use of this testimony and the precautions taken by the trial judge make it impossible for us to say that he transcended the limits of sound discretion in permitting it to be used by the government without making it available to the defense.

And very recently in *United States* v. *H. J. K. Theatre Corp., supra,* the Court of Appeals for the Second Circuit described the procedure under Rule 6 (e) as follows (236 F. 2d at p. 507):

> * * * However, where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury

> testimony to impeach the witness. The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant that part of the witness' Grand Jury testimony which contradicts the witness' trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal.

The trial judge's discretion was plainly not abused in this case (*supra*, pp. 111–113). Moreover, the trial was before the court without a jury, so that the trier of fact had the grand jury minutes before him. No significant discrepancy was shown. The testimony taken as a whole was strong. Under these circumstances, even if there had been error, it would have been harmless.

IV

THERE WAS FRAUD IN PETITIONER'S CONCEALMENT OF HIS COMMUNIST PARTY MEMBERSHIP, INDEPENDENT OF HIS ANSWER TO QUESTION 28

The complaint charged that Nowak, in his petition for naturalization, represented, *inter alia*, that he fully believed in the form of government of the United States, that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States (R. 3–4), and that these representations were false in that he concealed that he was a member of the Communist Party, although he knew and personally approved

of the activities, aims, and teachings of the Communist Party with respect to the violent overthrow of the government (R. 4–5).

Petitioner states that the court made no specific finding with respect to this charge. We do not agree. It is true that the court specified, under the heading of illegality, that there was a charge that defendant "concealed and falsely denied communist party membership" (App. 24) and said it was eliminating that ground of illegality because "nothing contained in Section 7 of the Nationality Act of 1906 * * * barred naturalization of one because he was a member of the Communist Party" (App. 25). On the other hand, the court found that petitioner was a member of the Communist Party from 1935 to 1938, "knowing of its main aim and objective which was the overthrow of this government by force and violence; that he approved of that aim and objective before and when he became a member of the Communist Party of the United States". It further found that "he intended to conceal such membership and such knowledge both when he signed his petition and when he was examined." (App. 27.) It stated its belief that "the fact that he kept his membership secret was counseled by knowledge on his part that certain inconsistencies existed between United States citizenship and membership in the Communist Party" (App. 31). It then said, "this court also finds that defendant answered 'No' to Question No. 28 of his original petition * * *".

In its conclusions of law, the court noted that petitioner answered Question 28 in the negative, knowing

that he was a member of the Communist Party and knowing of its aims and objectives. It said, "[t]herefore it was not only illegal for him to become a citizen of the United States but in concealing Communist Party membership he committed a fraud." This presumably referred to the fraud in answering Question 28. But the court went on to say (App. 33):

> Defendant's failure to make proper disclosure was not innocent. The concealment was deliberate—dictated by a desire to mislead lest what he was seeking would be denied.
>
> Further, also, in considering defendant's attachment to the principles of the Constitution. Here we are dealing with a state of mind, to-wit—defendant's intention at the time he swore allegiance to this country. Our guide is defendant's own words and conduct both prior and subsequent to his oath."

The court then pointed out that defendant was a militant Communist and had said that the goal was to extend the Soviet system around the earth. It concluded that, in cases where it is shown that citizenship was "wrongfully obtained," courts have no alternative but to rectify the wrong.

Taken in totality, these findings seem to us to represent a holding that petitioner committed a fraud, not only when he answered "No" to Question 28, but when he swore that he was attached to the principles of the Constitution of the United States. The District Court clearly found that the Communist Party, to petitioner's knowledge, had as a main objective the overthrow of the government by force and violence;

that petitioner approved of that aim and objective; that he himself advocated the extension of the Soviet system around the earth. It found that he knew that such membership was inconsistent with citizenship; that he intended to conceal such membership and such knowledge both when he signed his petition and when he was examined; and that he did so in order to obtain citizenship. This is a finding of fraud, irrespective of the duty to disclose Communist Party membership in answer to Question No. 28.

Petitioner does not dispute the fact that, if such fraud is established, a decree of naturalization may be cancelled. Advocacy of the violent overthrow of the government is not only, as we have discussed above (*supra*, pp. 75 *ff.*), *relevant* on the issue of lack of attachment; active and knowing participation in such advocacy renders knowingly false the statement in the petition for naturalization that petitioner was attached to the principles of the Constitution. Advocacy of the violent overthrow of government is the antithesis of attachment to the principles of the Constitution. On this aspect, the case rests on proof of such advocacy, not only by the Party, but by petitioner himself as an active Party member and functionary.

In his discussion of illegality, petitioner challenges the sufficiency of the evidence to show that he was not attached to the principles of the Constitution at the time he was naturalized, a discussion equally relevant to the present aspect of the issue of fraud. He relies, of course, on *Schneiderman* v. *United*

States, 320 U. S. 118; there, in a proceeding to cancel on the ground of illegality a certificate of naturalization issued to a Communist Party functionary in 1927, the Court found the evidence insufficient to establish (by the standard of clear, unequivocal, and convincing evidence) (1) that the Party advocated the overthrow of the government by violent means, or (2) that that defendant had himself adopted the philosophy of violent overthrow.[43] The Court pointed out that a tenable conclusion could be reached that (320 U. S. at 157), "the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner * * *". On this basis, it held (320 U. S. at 158–159):

> * * * We conclude that the Government has not carried its burden of proving by "clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt," that petitioner obtained his citizenship illegally. In so holding we do not decide what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's testimony is ac-

[43] See *Dennis* v. *United States*, 341 U. S. 494, 568–569, fn. 12 (concurring opinion of Mr. Justice Jackson). This Court said in *Schneiderman* (320 U. S. at 146), "* * * the record is barren of any conduct or statement on petitioner's part which indicates in the slightest that he believed in and advocated the employment of force and violence, instead of peaceful persuasion, as a means of attaining political ends."

> ceptable at face value. We hold only that where two interpretations of an organization's program are possible, *the one reprehensible and a bar to naturalization* and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization *in the absence of overt acts indicating that such was his interpretation.* * * * [Emphasis added.]

Thus, the *Schneiderman* opinion itself recognized that proof of individual advocacy of violent overthrow could have been "a bar to naturalization" under the 1906 Act. Such individual proof was supplied here (*supra*, pp. 105–108).

Furthermore, the holding in *Schneiderman* is neither dispositive of the issue of the nature of the Communist Party in 1937–1938, nor of the implications of such membership at that time. See *Yates* v. *United States*, 354 U. S. 298, 336, where this Court said: "The Court in *Schneiderman* certainly did not purport to determine what the doctrinal content of 'Marxism-Leninism' might be at all times and in all places. Nor did it establish that the books and pamphlets introduced against Schneiderman in that proceeding could not support in any way an inference of criminality, no matter how or by whom they might thereafter be used." *Schneiderman* was concerned with the teachings and advocacy of the Communist Party prior to 1927, as proved in that case and as

they bore on the behavior of one individual member in connection with an inquiry into whether that particular individual was attached to the principles of the Constitution at that time. The instant case concerns another individual and brings into issue, on a different record, the nature of the Party a decade later when, during the depression years, it had become stronger and more outspoken in announcing its ultimate scheme for the United States of violent revolution in conformance with the master program of the Third International, and in indoctrinating its membership with the necessity of subscribing to that principle as a condition of membership. See *supra*, pp. 97–101.

On this record, there was clear and convincing proof that, at the time of his naturalization, petitioner was a knowing and active participant in an organization advocating the violent overthrow of the government, and that he personally subscribed to those views. If those facts, deliberately concealed by petitioner, had been known to the naturalization court, petitioner would not properly have been admitted to citizenship since he was not a person whose behavior was consistent with attachment to the principles of the Constitution. Cf. *Chomiak* v. *United States*, 211 F. 2d 118, 119–120 (C. A. 6), certiorari denied, 348 U. S. 817; *Stasiukevich* v. *Nicolls*, 168 F. 2d 474, 477–478; and see Colvin, *Attachment to the Principles of the Constitution in Naturalization Cases*, 1 Ala. L. R. 228–258.

V

PETITIONER'S CERTIFICATE OF CITIZENSHIP WAS PROPERLY CANCELLED ON THE GROUND OF ILLEGALITY, IN ADDITION TO THE GROUND OF FRAUD IN ITS PROCUREMENT

In addition to finding that petitioner perpetrated a fraud on the naturalization court, the District Court also found that, since petitioner had been a knowing and participating member in an organization teaching and advocating the violent overthrow of the United States Government, he had procured his naturalization illegally. The court found that the proof of such membership—taken together with the evidence of his (App. 33) "own words and conduct both prior and subsequent to his oath" (considered apart from proof of his false swearing)—establishes that he was not at the time a person of good moral character, attached to the principles of the Constitution and well disposed to the good order and happiness of the same, within the statutory prerequisites for citizenship under Section 4 of the 1906 Nationality Act (*supra*, p. 3). Petitioner urges, *first*, that the record is insufficient to establish lack of attachment, and, *second*, that in the absence of a finding of fraud his naturalization decree precludes, on the theory of *res judicata*, the reexamination in cancellation proceedings of his qualifications for citizenship.

The issue of illegality is reached in this case only if the Court finds the proof of false swearing insufficient in some respect, since there is no question, and petitioner does not dispute, that his citizenship could be cancelled if in fact he falsified material facts in his

naturalization proceeding. On illegality, if it be reached, it is the government's position that, since the evidence established that petitioner was in fact not attached to the principles of the Constitution at the time of his naturalization, his certificate was properly cancelled under the 1940 Nationality Act as illegally procured.[44]

A. We have already discussed, *supra*, pp. 94 *ff.*, 120–123, the sufficiency of the proof to show that petitioner was not in fact a person attached to the principles of the Constitution at the time he was naturalized. Proof of membership in an organization teaching and advocating overthrow of the United States Government, taken together with all the other evidence showing petitioner's full participation in and agreement with those aims and purposes, establishes the fact of non-attachment.

B. Petitioner's second argument, based on the concurring opinion of Mr. Justice Douglas in *Schneiderman* v. *United States*, 320 U. S. 118, 161, is that, if fraud was not proved, the decree of naturalization precludes, as barred by *res judicata*, inquiry in the denaturalization proceedings into the question of whether petitioner was actually a person whose behavior showed a lack of attachment to the principles

[44] Illegality is not a ground for cancellation of a certificate of naturalization under the Immigration and Nationality Act of 1952. The action against petitioner was instituted prior to the effective date of that Act.

of the Constitution within the meaning of Section 4 of the 1906 Act.[45]

It should be noted at once that this is not a case in which the naturalization court, with the full facts before it, reached one conclusion, which another court in the denaturalization proceedings is seeking to re-examine. Assuming that petitioner did not understand that he was under a duty to disclose his Communist Party membership in answer to Question 28, and that he did not intend to defraud in his statement that he was attached to the principles of the Constitution, the fact remains that the naturalization court rendered its decision without full knowledge of the true facts. On the true facts, which were not before the naturalization court, petitioner was not entitled to the naturalization he obtained.

This Court has consistently held that the failure of an alien to comply strictly with the conditions which Congress has made prerequisite to an award of citizenship renders the certificate of citizenship subject to cancellation, whether the facts establishing non-compliance were or were not known to the naturalization court. *Maney* v. *United States*, 278 U. S. 17; *United States* v. *Ness*, 245 U. S. 319; *Ginsberg* v. *United States*, 243 U. S. 472; *Luria* v. *United States*, 231 U. S. 9, 24; *Johannessen* v. *United States*, 225 U. S. 227, 240; *Schwinn* v. *United States*, 311 U. S. 616;

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[45] In *Schneiderman*, the Court assumed without deciding that, in the absence of fraud, a certificate of naturalization could be set aside under Section 15 of the 1906 Act as "illegally procured" because the finding as to attachment was erroneous. 320 U. S. at 124–125.

United States ex rel. Brancato v. *Lehman*, 239 F. 2d 663, 665 (C. A. 6). In *Ginsberg* v. *United States*, 243 U. S. 472, a certificate of naturalization was cancelled because the hearing was held in chambers, rather than in open court, obviously a fact known at the time of naturalization. This Court said, at p. 475:

> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential.

In *United States* v. *Ness*, 245 U. S. 319, a certificate of naturalization was cancelled because of the failure to file a certificate of arrival. This ground had been urged by the government in opposition to the granting of the naturalization and had been overruled at the time. The Court rejected the defense of *res judicata* in the denaturalization proceedings, saying that Section 11 (providing for appearance by an examiner in the naturalization proceeding) and Section 15 (the denaturalization section) "were designed to afford cumulative protection against fraudulent or illegal naturalization" (245 U. S. 327).[46]

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[46] The *Ness* case cannot be distinguished on the ground that the right of appeal in naturalization cases had not then been recognized. In *Tutun* v. *United States*, 270 U. S. 568, 578, which established the right of appeal, Mr. Justice Brandeis,

In this case, at the time he was naturalized petitioner did not in fact meet the essential requisites of citizenship—he was not and had not behaved as a person attached to the principles of the Constitution. His decree of naturalization should not have been entered; it was therefore subject to cancellation as illegally procured. *Chomiak* v. *United States*, 211 F. 2d 118, 119–120 (C. A. 6), certiorari denied, 348 U. S. 817.

CONCLUSION

It is respectfully submitted that the judgments below should be affirmed.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
CARL H. IMLAY,
Attorneys.

JANUARY 1958.

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speaking for a unanimous Court, said, "If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit."

APPENDIX

AFFIDAVIT OF "GOOD CAUSE"

C-4493619

UNITED STATES OF AMERICA,
District of Columbia, ss:

Reuben Speiser, being duly sworn, deposes and says:

1. That he is an Attorney, Immigration and Naturalization Service, United States Department of Justice, and as such has access to the official records of the said Service, from which the following facts appear:

(*a*) That one STANISLAW NOWAK filed a petition for naturalization in the United States District Court at Detroit, Michigan, on December 15, 1937, and was admitted to citizenship by that court on June 13, 1938, receiving certificate of naturalization No. 4493619.

(*b*) In the proceedings which led to his naturalization the said Stanislaw Nowak alleged under oath:

(i) That he fully believed in the form of government of the United States; that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country.

(ii) That he was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he was attached to the principles of the Constitution of the United States

and well disposed to the good order and happiness of the United States; and that he would renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty of which he was a subject.

(iii) That he was not and never had been a member of the Communist Party.

(iv) That he would support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion.

(*c*) That the allegations of said Stanislaw Nowak as set forth in subparagraph 1 (*b*) were false and untrue as more particularly set forth below.

(*d*) That said Stanislaw Nowak was an active member of the Communist Party of the United States from about 1935 until the date of his naturalization and has continued such membership until the present time.

(*e*) That the said Stanislaw Nowak and the said Communist Party of the United States at all of the times mentioned herein:

(i) Advised, advocated, or taught the overthrow by force or violence of the government of the United States;

(ii) Advised, advocated, or taught the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers of the government of the United States because of his or their official character;

(iii) Advised, advocated, or taught the unlawful damage, injury, or destruction of property;

(iv) Advised, advocated, or taught sabotage;

(v) Wrote, circulated, distributed, printed, published, or displayed, or caused to be written, circulated, distributed, printed, published, or displayed or had in their possession for the purpose of circulation, distribution, publication, issuing, or display, written and printed matter which advised, advocated, or taught the performance of the acts described in subparagraphs 1 (*c*) i, ii, iii, and iv;

(vi) Promoted, influenced, and advanced the political activities, public relations, and public policy of the Union of Soviet Socialist Republics.

(*f*) That at all of the times above mentioned, the Communist Party of the United States was a section of an international organization whose principal officers were citizens or subjects of the Union of Soviet Socialist Republics and the principal offices of which were situated in Moscow, in the Union of Soviet Socialist Republics; that decisions made by such organization were binding upon other Communist Parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

(*g*) That at all times since 1935 the said Stanislaw Nowak bore allegiance to the Union of Soviet Socialist Republics; that at the time of his admission to United States citizenship the said Stanislaw Nowak did not intend to renounce or abjure his allegiance to the Union of Soviet Socialist Republics, but on the contrary intended to retain his allegiance to such foreign power.

(*h*) That the said Stanislaw Nowak intentionally and deliberately made false statements in the proceedings leading to his naturalization as set forth in the

preceding paragraphs in order to prevent the making of a full and proper investigation of his qualifications for citizenship; to conceal his lack of attachment to the principles of the Constitution; to induce the naturalization examiner to make an unconditional recommendation to the court that his petition be granted; to preclude inquiry by the court concerning his qualifications for citizenship; and to procure naturalization in violation of law.

2. That the naturalization of said Stanislaw Nowak was illegally and fraudulently procured in that:

(*a*) He was not a person of good moral character at the time of his naturalization because he made false statements in the proceedings leading to his naturalization, as more particularly set forth in paragraph 1.

(*b*) He was not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States inasmuch as he was then and theretofore had been an active member in the Communist Party of the United States, an organization which, to his knowledge, espoused the aims, objectives and programs more particularly set forth in paragraph 1 (*e*);

(*c*) He deliberately and intentionally made false statements in the proceedings leading to his naturalization as more particularly set forth in paragraph 1; that such false statements were made for the purposes set forth in paragraph 1 (h); and

(*d*) He did not intend to support the Constitution and laws of the United States and renounce all foreign allegiance inasmuch as he intended to and did retain allegiance to the Union of Soviet Socialist Republics.

3. That good cause exists for the institution of a suit under Section 338 (a) of the Nationality Act of 1940 (8 U. S. C. 738 (a)) to set aside and cancel the

naturalization of Stanislaw Nowak as having been illegally and fraudulently procured.

4. That the last known place of residence of said Stanislaw Nowak is 7525 Wykes, Detroit, Michigan.

/s/ REUBEN SPEISER,
Attorney.

Subscribed and sworn to at Washington in the District of Columbia this 3rd day of December 1952, before me, the General Counsel of the Immigration and Naturalization Service, United States Department of Justice, authorized by Section 60.26 of Title 8 of the Code of Federal Regulations to administer oaths.

/s/ L. PAUL WININGS,
General Counsel.

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IN THE

Supreme Court of the United States

October Term 1957

No. [redacted] 72

STANISLAW NOWAK,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

OSMOND K. FRAENKEL,
120 Broadway,
New York, New York,
Attorney for National Lawyers Guild.

JESSICA DAVIDSON,
of Counsel.

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IN THE

Supreme Court of the United States

October Term 1957

No. 729

STANISLAW NOWAK,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

The Interest of the National Lawyers Guild

The National Lawyers Guild is a national Bar association concerned not only with the interests of the legal profession but with its responsibilities, among them the duty to defend the constitutional rights of the people against government encroachment. To that end it has intervened in significant cases involving such rights.

The National Lawyers Guild intervenes in this denaturalization case because the issues herein are of basic importance, constitutionally and socially. This case involves the oft-recurring issue of the power of government in the area of opinion and association, and the issue in this

instance arises in a case where the exercise of those constitutional rights, if the government's position is upheld, threatens the naturalized citizen with loss of his citizenship during his entire lifetime.

These are matters which go beyond the limits of this case or the interest of this appellant. It is our duty to uphold First Amendment rights against abridgment and to resist the effort of government to penalize the exercise thereof, as in this instance by denaturalization. Further, the status of citizenship is a precious right, one which this court has evaluated as "all that makes life worth living". Its value extends beyond the individual to the entire society. The assertion of power by government to strip it from any alien at any time for his opinions and associations is a social and economic deprivation for the naturalized millions and for the native, between whom the years have formed firm ties.

The National Lawyers Guild has a special interest in this case because it deems the statute here involved to constitute an infringement upon the rights and power of the judiciary and upon the sanctity of judicial decree.

Respectfully submitted

OSMOND K. FRAENKEL,
Counsel for Petitioner.

Introduction

As the complaint is framed in this proceeding, the issue is whether proof that a citizen, naturalized in 1938, was a member of the Communist Party at the time of his naturalization is proof (1) that he was not of a good moral character and was not attached to the principles of the Constitution, and (2) that he lied when he said that he was so attached and when he denied association with any organization which teaches or advocates anarchy or the violent overthrow of existing governments. The first formulation states a charge of illegal procurement; the second, a charge of fraud.

In the light of the holding in *Schneiderman* v. *U. S.*, 320 U. S. 118, and of the opinion expressed in Justice Douglas' concurrence therein at page 165, that "where all the express statutory conditions precedent are satisfied * * * the judgment of naturalization is final and conclusive except for fraud", we can dispose summarily of the charge of illegal procurement, echoing the recent holding of this Court in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244:

> "During the period when [he] was a member, the Communist Party was a lawful political party with candidates on the ballot in most States * * * 'Mere unorthodoxy (in the field of political and social ideas) does not as a matter of fair and logical inference, negative good moral character'."

We agree with Justice Frankfurter's concurring opinion in the *Schware* case, *supra*, at 251, that "To hold * * * that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted."

The 1906 statute with which we are here concerned did not bar members of the Communist Party from citizenship nor did it prohibit the naturalization of members of or-

ganizations advocating forcible overthrow of the government. Members of such organizations who were granted citizenship under the 1906 statute did not, therefore, gain their citizenship by "illegal procurement"; no "express statutory conditions precedent" were flouted.

The question remains whether false denial or concealment of such membership constituted such a fraud upon the court as to vitiate the court's finding of good moral character. Here the Government's argument is simple to state: Under the 1906 statute Communists could perhaps become citizens but liars could not.

As no one is a liar who states what he believes to be true (whether in fact it be true or not) the Government bears the burden of proving not only that petitioner *was* a member of an organization advocating forcible overthrow but that he knew he was. (It should be noted that the lower court did not credit the evidence that petitioner was asked about and denied membership in the Communist Party as such.) Petitioner's brief properly directs itself to the question of whether, in fact, petitioner knew or should have known that his answers concerning membership in organizations advocating forcible overthrow and his avowals of attachment to the principles of the Constitution were false. We shall not duplicate this argument. We shall rather direct ourselves to two broader questions: 1—whether the First Amendment permits Congress to authorize cancellation of citizenship for fraud based upon a finding of concealment of membership in a political organization (even if that organization advocates forcible overthrow); and, 2—whether Article III of the Constitution permits Congress to authorize the courts to review (without time limitation) findings made (and incorporated into a final judgment) concerning good moral character and attachment to the Constitution, when such findings are challenged by new evidence directed solely to proof of concealment of political belief and affiliation.

POINT I

If the statute is construed to permit denaturalization for concealment of political beliefs and affiliation, it is unconstitutional, as a law abridging freedom of speech and assembly in violation of the First Amendment.

There is irony in requiring, as a condition of naturalization, "attachment to the principles of the Constitution" and, in the same breath, attacking as a fraud upon the court, the concealment of political beliefs and affiliations. For, "if any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guarantees of the Bill of Rights and especially that of freedom of thought contained in the First Amendment. Cf. Justice Holmes' dissent in *U. S.* v. *Schwimmer* (279 U. S. 644)". *U. S. v. Schneiderman,* 320 U. S. 118, 144.

In the *Schneiderman* case, this Court, finding the evidence insufficient to support denaturalization for "illegal procurement" based on lack of attachment, did not reach the question of the conflict between the statute and the inhibitions of the First Amendment. But the majority opinion there could hardly have afforded clearer implication of what the holding would have been had the question been reached. Only the year before, in the ringing words of *W. Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, the Court struck down, as violative of the First Amendment principles, a statute which sought to compel "compulsory unification of opinion". When such a court, reviewing a denaturalization decree, says, as it did in *Schneiderman,* "Our concern is with what Congress meant to be the extent of the area of allowable thought under the statute" (320 U. S. at 139, and again at 144), it is fair to assume that the tone is sardonic in the extreme. For we, who are deeply "attached to the principles of the Constitution" and especially to the safeguards of freedom

of thought and association therein, are unwilling to believe that this Court will ever consider that Congress has the authority—in any area of its enumerated or implied powers—to delimit the "extent of the area of allowable thought".

Congressional authority, under Art. I, Par. 8, to establish a uniform rule of naturalization is no broader than any of its other enumerated powers, and the exercise of this authority is subject to the restrictions of the First Amendment. The plenary power of Congress to regulate immigration has cast an aura of confusion over the limitations upon Congress' power to deal with aliens within our borders. See *U. S.* v. *Witkovich*, 353 U. S. 194, 201, and especially the dissent therein at 208. The notion that alien-born persons, even after they have been granted citizenship status, remain 'wards of U. S. District Attorneys, U. S. investigators, U. S. judges" (*Meyer* v. *U. S.*, 5th Cir. 1944, 141 F. 2d 825, 831) persists in segments of the judicial as well as the executive and legislative branches, in spite of repeated pronouncements to the contrary.

There is considerable doubt of the power of Congress even to deny *admission* to the country to a person whose only alleged disability is the belief he holds. *Turner* v. *Williams*, 194 U. S. 279, 293-4. And compare *U. S.* v. *MacIntosh*, 283 U. S. 605, 619, with *Girouard* v. *U. S.*, 328 U. S. 61, 69. Further, it is clearly established that the First Amendment applies as well to aliens as to citizens. *Bridges* v. *Wixon*, 326 U. S. 135, 148; *U. S.* v. *Witkovich*, *supra*, at 201. And, even were we to concede—which we do not—that Congress may authorize denial of naturalization on the basis of political belief and affiliation alone, it must be remembered that "the denial of application for citizenship * * * presents a problem very different from the revocation of a naturalization certificate once admission to the community of American citizenship has been decreed." *Baumgartner* v. *U. S.*, 322 U. S. 665, 675.

In discussing whether the abjuration of governmentally prohibited political belief and affiliation can properly be considered a criterion of attachment to the Constitution, and hence a prerequisite of citizenship, we wish to make clear at the outset that we are *not* dealing with the situation faced by this Court in *Knauer* v. *U. S.*, 328 U. S. 654. We may say that we disagree with much of the reasoning in *Knauer* and we believe that to regard a naturalized citizen's oath of allegiance as "a promise of future conduct", and to regard his certificate of citizenship as subject to cancellation for breach of that promise is to create a second-class citizenship which the Constitution nowhere permits and which the courts have decried. *Minor* v. *Happersett*, 21 Wall. (88 U. S.), 162, 165; *Elk* v. *Wilkins*, 112 U. S. 94, 101; *Luria* v. *U. S.*, 231 U. S. 9, 22. We do nevertheless agree that Congress, in providing a uniform rule of naturalization has a right to demand a sincere oath of single allegiance and to require a new citizen to swear truly that he has severed his ties of allegiance to his native land. *Knauer* was decided on the basis of a finding that when defendant renounced allegiance to the country of his birth—Germany—he did so with tongue in cheek. ("The conclusion is irresistible, * * * that when he foreswore allegiance to the German Republic he swore falsely * * *. Since fraud in the oath of allegiance which Knauer took is sufficient to sustain the judgment below, we do not reach the other questions which have been argued", *Knauer* v. *U. S.*, *supra*, at 660, 674.)

There is no such issue here. Petitioner's oath of allegiance is not challenged; there is no breath of a suggestion that petitioner retained any attachment to his native land. Rather, as the lower court herein phrased it, "the rivalry here is not between land of birth and land of adoption, but between the latter and a political ideology" (133 F. Supp. at 196).

Under the First Amendment, such a concept of "rivalry" is wholly untenable, and *Knauer* is no authority

for the proposition that concealment of a political ideology constitutes a fraud upon the court.

Nor is there any other precedent in this Court to establish Congressional power to condition continuing citizenship upon full disclosure of political belief and abjuration of prohibited doctrine. While lower court precedents abound, (see Comment: Attachment to the Principles of the Constitution in Naturalization Cases, 1 Ala. L. R. 228-58 (1949)), the *Schneiderman* case was, as this Court pointed out (320 U. S. at 123), "the first case to come before (it) in which the government sought to set aside a decree of naturalization years after it was granted on the charge that the finding of attachment was erroneous." This Court refused to do so. In *Baumgartner* v. *U. S.*, 322 U. S. 665, this Court also refused to approve a denaturalization decree; there the issues partook partly of the problem in *Schneiderman* and partly that of divided allegiance as in *Knauer*. There have been no cases since in this Court. The slate is clean.

It is highly questionable that Congress intended to use the term "attachment to the principles of the Constitution" to include an unquestioning patriotism. As Judge Learned Hand said in *U. S.* v. *Rossler*, 2d Cir., 1944, 144 F. 2d 463, 465:

> "That attachment to the principles of the Constitution which the law exacts at naturalization * * * demands no affection for, or even approval of, a democratic system of government, but merely an acceptance of the fundamental political habits and attitudes which here prevail and a willingness to obey the laws which result from th m * * *. Patriotism is not a condition of naturalization, any more than it is a test of continued native citizenship * * * the test * * * [is] only the honesty of his declaration that he was ready to abide by the laws of the United States * * *."

If the term "attachment" means more than this, if the oath of allegiance is designed as a test oath for the suppression of heretical beliefs, the statute is invalid under the First Amendment. Compare Justice Frankfurter's dissent in *W. Virginia Board of Education* v. *Barnette*, *supra*, at 664, with the majority approach and treatment of the meaning of the flag salute. Only because Justice Frankfurter was able to see in the pledge of allegiance to the flag "no kinship whatever to the oath tests so odious in history"; only because he was able to find that "saluting the flag (which is to say, pledging 'allegiance to the flag of the United States of America and to the Republic for which it stands') suppresses no belief nor curbs it"; only because the taking of the pledge left both the children and their parents free "to disavow as publicly as they chose to do the meaning that others attach to the gesture of salute", was he able to view the pledge requirement as consonant with the constitutional protections of freedom of thought and speech. The majority, viewing the pledge in a different light—as the Government seeks to have the Court view it here—was forced to declare the statute unconstitutional as violative of First Amendment principles.

What remains is the proposition that even though petitioner could not be denied citizenship (nor, surely, lose it now, retroactively) because of his beliefs and affiliations had he admitted them, still, the fact that he concealed such beliefs or affiliations shows him to have been an unworthy person, of bad moral character.

To this we say that if petitioner's beliefs and affiliations were not material to the grant of citizenship, he had no duty to disclose them to the examiners or to the court. Compare *U. S.* v. *Kessler*, 3d Cir. 1954, 213 F. 2d 53, with *Corrado* v. *U. S.*, 6th Cir. 1955, 227 F. 2d 780, where the line of demarcation is clearly drawn as to the effect of concealment, in naturalization cases, of a criminal record.

Moreover, if he has such a duty, we must ask with the court in *U. S. v. Kusche*, S. D. Cal. 1944, 56 F. Supp. 201, 237:

> "Can it be that the alien is guilty of fraud as to what his thoughts and beliefs are because he did not disclose (if he did not disclose) them to an examiner voluntarily? He had been repeatedly asked if he was an anarchist or a polygamist, or believed in assaulting or killing officials of this or other governments, or believed in overthrowing this government by force and violence. Must he then in addition to that disclose to the naturalization officials, voluntarily, his opinions and beliefs on the entire gamut of *actual* and *possible* political views?"

Finally, and simply, we cite *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 262, 267, 269-71, and *Sweezy* v. *State of N. H.*, 354 U. S. 234 at 255.

POINT II

If the statute is interpreted to authorize the courts to cancel a decree of naturalization upon review (without time limit) of the original grant, it is unconstitutional under Article III, Section 2.[1]

It does not necessarily offend one's basic notions of civilized conduct to consider that the naturalized citizen should be placed on a lower rank than the native-born,

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[1] Constitution of the United States of America, Article III, Section 2.

[§ 1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different

that citizenship should be granted him only as a boon and not as a matter of right, nor that such a grant, once made, should be revocable at the will of the government. Under the laws of many countries of the western world today and in the recent past this has been the situation. The Dominican Republic grants conditional naturalization which can be cancelled within five years but is thereafter definitive. Chap. III, Art. 17, Nationality Act, No. 1863 of April 16, 1948; U. S. Doc. 475 at p. 128. British law which, during the 19th century, treated the grant of citizenship as a royal prerogative, even now allows for revocation of a certificate of naturalization upon an administrative finding that "the person to whom the certificate is granted has shown himself by act or speech to be disaffected or disloyal to his Majesty". British Nationality and Status of Aliens Act, 1914, as amended, 1918, c. 83, Sec. I, Stats. of England 189, 190; Repeated in Act of July 1948, Sec. 20(3)(a), U. N. Doc. 475.

But the United States Congress is not free to adopt this approach. It has only the powers expressly granted to it and it is subject to the restrictions imposed upon it by the Constitution. Under the Constitution naturalized and native-born citizens stand upon an equal footing (but for the

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States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[§ 2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[§ 3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

qualification to serve as President), *Minor* v. *Happersett*, 21 Wall. (88 U. S.) 162, 165, and cases cited with it, *supra* (p. 7). And Congress' power to deal with the Matter is limited to the power granted in Article I, Sec. 8, "to establish an uniform rule of naturalization".

For the better part of our history as a nation it was not thought that the power to establish a rule of naturalization carried with it any power, express or implied, to authorize the cancellation of citizenship. On the contrary,

> "The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *Osborn* v. *Bank*, 9 Wheat. (22 U. S.) 738, 827; cf. *Spratt* v. *Spratt*, 4 Pet. (29 U. S.) 393."

As this Court said in *U. S.* v. *Wong Kim Ark*, 169 U. S. 649 at 703, "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

Of course, the power to grant a status and to set the conditions for such grant clearly implies the power to withhold the grant from a specified class of persons. But neither in logic nor in law does it imply the power to destroy the individual's status once it has been granted. Expressed in terms of law, it is unlikely that the suggestion would be seriously entertained that Congress, having the power under Article IV to admit new states to the Union, has a corresponding authority to expel states which have been brought into the Union by exercise of this power. Phrased in terms of the logic of human morality, it may be conceded that parents are free to have or not to have a child, but if they have brought the child into being they are not free to destroy it.

It is because of this lack of power to establish rules of *de*naturalization and because of the constitutional inhibi-

tions against the creation of second-class citizenship for the foreign born that the law of denaturalization came into being so late in our history and developed in the unique and peculiar way in which it did. The only theory, consonant with the Constitution, upon which citizenship could be revoked (as distinguished from voluntary renunciation) was the theory that it had never been properly granted in the first place—that the original decree of naturalization was faulty and that the status of citizenship had never come into being.

It is upon this theory that all the legislation is ostensibly based and it is this theory which the courts have used to justify nullification of judicial decrees upon subsequent findings of "fraud" or "illegal procurement".

The early cases in this Court turned on a finding of (1) lack of jurisdiction in the courts to grant citizenship to persons who were ineligible by reasons of race, *Yamashita* v. *Hinkle*, 1922, 260 U. S. 178, and *Toyota* v. *U. S.*, 1925, 286 U. S. 402 (Japanese), and *Thind* v. *U. S.*, 1923, 261 U. S. 204 (Hindu); for compilation of lower court cases see *U. S.* v. *Kusche, supra*, 56 F. Supp. at 213-15; (2) failure to meet purely formal requirements, such as possession of a certificate of arrival, *U. S.* v. *Ness*, 245 U. S. 319; *Maney* v. *U. S.*, 278 U. S. 17, viewed as demonstrating a lack of jurisdictional prerequisites rendering the grant of citizenship a nullity. In a case involving a failure to meet the residence requirements, this Court went so far as to say that "every certificate of citizenship must be treated as granted upon condition that the government may challenge it * * * and demand its cancellation unless issued in accordance with such requirements." *U. S.* v. *Ginsberg*, 243 U. S. 472, 475.

There may have been justification for this approach at a time when a grant of citizenship was an *ex parte* decree where the government had no chance to appear in opposition, *Johanessen* v. *U. S.* (1911), 225 U. S. 219, 239, nor

to appeal from the decree, *U. S.* v. *Ness* (1917), 245 U. S. 319. But it has since been firmly established that an appeal from the grant of naturalization does lie, *Tutun* v. *U. S.*, 270 U. S. 568, 575, and, as this Court pointed out in the *Schneiderman* case, *supra*, at 123, "we are dealing here with a court decree entered after an opportunity to be heard." Citing the *Tutun* case, this Court noted, at 124, Note 3, that the courts' jurisdiction is subject to Article III and pointed out that "For this reason it has been suggested that a decree of naturalization * * * cannot be compared (as was done in *Johanessen* v. *U. S.*, 225 U. S. 227, 238) to an administrative grant of land or of letters patent for invention, and that the permissible area of re-examination is different in the two situations". The majority expressly refused to rule upon the question, but Justice Rutledge in his concurrence adopted the suggested viewpoint, saying, at pp. 168-9:

> "* * * it is a *judgment*, rendered in the exercise of the judicial power created by Article III, which it is sought to overthrow, not merely a grant like a patent to own land or for invention. Congress has plenary power over naturalization. That no one disputes. Nor that this power, for its application, can be delegated to the courts. But this is not to say, when Congress has so placed it, that body can decree in the same breath that the judgment rendered shall have no conclusive effect. Limits it may place. But that is another matter from making an adjudication under Article III merely an advisory opinion * * *. Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority."

Justice Douglas, concurring, took the view that judgments of naturalization are final and conclusive "except for fraud". If the kind of fraud Justice Douglas had in

mind was the type asserted here—concealment of a state of mind or of political belief or affiliation—then his opinion has little meaning beyond that of procedural niceties and comes most oddly in the *Schneiderman* case of all cases. For there has been no clear line of distinction between what constitutes "fraud" and what "illegal procurement". (See the perceptive analysis of the confusion on this subject in Maloney, Involuntary Loss of American Citizenship, 4 St. Louis U. L. J. 50, 53-5). In the *Schneiderman* case itself, the Government originally proceeded on both charges (on the same proof) and abandoned the fraud charge only because it had won on the other in the Court of Appeals. See 320 U. S. at 122.

Of course, it is hornbook law that judgments are binding except for fraud. But if everything and anything can be classified as "fraud", what is the value of the maxim? This Court has held the plaintiff to most stringent rules of pleading and evidence in fraud cases. "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry", *Wood* v. *Carpenter*, 101 U. S. 135, 143.

Both the courts and the legislature (see 8 U. S. C. 1451(e)) have in fact been unwilling to accept the full consequences of the government's theory of denaturalization for fraud—a voiding of the judgment *ab initio*, a declaration that the citizenship status never existed. In *U. S. ex rel. Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, neither the majority nor the dissenting justices were willing to accept the idea that a naturalized citizen who committed a crime and was *thereafter* denaturalized for fraud in the procurement of citizenship should be regarded as one who had never ceased to be an alien. In that case the Government argued, with the full logic of the legal fiction behind it, that Eichenlaub was deportable as an alien, that he had never achieved citizenship status because his decree had been obtained by fraud. No member of this

Court accepted that view. The majority avoided the issue, saying, " * * * it is not necessary to give retroactive effect to the denaturalization orders * * * the Act does not require that offenders must have had the status of aliens at the time they were convicted" (at pp. 529-30). Justice Frankfurter's dissent (in which Justices Jackson and Black concurred) sought to view the denaturalization as prospective in effect and analogized it to loss of citizenship by so-called voluntary expatriation which does, of course, operate only for the future. But if denaturalization is to be accomplished within the framework of the Constitution it *is* necessary to give "retroactive effect" to the denaturalization order. For unless the order was void *ab initio* it *must* be proof against subsequent attack for intrinsic fraud. The doctrine of *U. S.* v. *Throckmorton,* 98 U. S. 61, 65, has not been laid to rest.

If we can realize that whether we call the problem one of "illegal procurement" or "fraudulent procurement" or failure to meet "jurisdictional requirements", we are dealing with a case—and behind it and ahead of it scores of similar cases—in which final judgments granting citizenship to persons who meet the objective qualifications are vitiated ten, twenty, thirty years later because the political climate has changed and the citizens' "loyalty" is questioned, we will be closer to an understanding of the problem and a solution of it.

This is not the kind of fraud for which Congress did or could intend to vitiate a judgment. Certificates of citizenship were never intended to be "licenses to be an American, * * * as easy to revoke as a driver's license", *Maloney,* op. cit. at 55.

CONCLUSION

We urge this Court to restore the concept of citizenship to its proper and deserved status and to insure that the words of the Fourteenth Amendment—"*All* persons born or naturalized in the United States * * * *are* citizens of the United States * * * " have real meaning to the foreign-born among us.

Respectfully submitted,

OSMOND K. FRAENKEL,
120 Broadway,
New York, New York,
Attorney for National Lawyers Guild.

JESSICA DAVIDSON,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 72

STANISLAW NOWAK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR THIRTY-TWO NATURALIZED CITIZENS *AMICI CURIAE*

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York 17, N. Y.,
Attorneys for Amici Curiae.

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In *Spratt* v. *Spratt*, *supra*, Mr. Chief Justice Marshall ruled: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. The judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity." In *Pintsch Compressing Co.* v. *Bergin*, *supra*, the court, in rejecting a contention seeking to overturn a naturalization judgment, pointed out (at 141) that the challenged qualification had "presumably [been] passed on by the court before it admitted the respondent to citizenship * * *. * * * Whatever may have been the condition under previous statutes, proceedings in a court of record under this legislation are judicial, and result in a judgment which can be impeached only as other judicial judgments may be."

2. *The judgment of naturalization could be attacked and revoked before the lapse of the term of court on the ground of simple fraud or perjury.* *United States* v. *Kornmehl*, 89 Fed. 10 (D. C. N. J. 1898): "The court was deceived, and the letters of naturalization were improvi-

dently issued. They are still within the control of the court, and an order should be entered revoking them, and directing that they be returned to the clerk of the court for cancellation."

3. *The judgment of naturalization could be attacked and revoked after the lapse of the term on the ground that it was void because the naturalizing court had no jurisdiction over the subject matter.* *State ex rel. Bancroft* v. *Stumpf, supra,* at 632: "The proceedings before the justice of peace were void and parole evidence was admissible for the purpose of showing their invalidity. The law of Congress authorized the declaration to be made before the clerk of the court, and he alone has the authority to administer the oath." *People* v. *McGowan, supra*: The court will not consider false declarations to impeach a judgment, but will determine whether the court granting citizenship had statutory jurisdiction.

4. *The naturalization decree could not be attacked on the ground of mere irregularity, the failure to comply with some provision, however basic, or any other defect short of fraud.* Thus, in *Andres* v. *Judge of Circuit Court, supra,* it was held that the fact that the declaration of intention was not sworn to in open court did not operate as a ground to invalidate the decree. In *United States* v. *Norsch, supra,* an attempt was made to invalidate in a federal court a state decree of naturalization on the ground that the witnesses for the applicant for naturalization had never been examined and that no inquiry at all was made into his qualifications. The court ruled that in the absence of a fraud sufficiently grave to impeach a judgment, the bill seeking cancellation of the decree was defective. It stated (at 419): "It will not do, in a bill of this character, to show merely that the judgment assailed is erroneous and ought not to have been entered; neither will it suffice to charge generally that it was fraudulently procured or that the court was imposed upon. A state of facts must be disclosed by the

bill from which the court can see that the conclusions stated by the pleader, to the effect that the judgment was fraudulently procured, etc., are properly drawn." The court concluded that the fact that the decree was erroneous and irregular, in that Congressionally authorized procedures were disregarded, could not be remedied by the bill or the court.

In *State ex rel. Lacy* v. *Brandhorst*, *supra*, the court, relying on *Spratt* v. *Spratt*, ruled that a judgment erroneously naturalizing a minor could not be attacked collaterally after the lapse of the term. "Such naturalization judgment cannot be impeached * * * for mere error or irregularity. * * * The worst that can be said of the judgment that naturalized respondent is that the court giving that decision, 'gave the wrong decision, when it had the power to give the right one.'"

In *Behrensmayer* v. *Kreitz*, *supra*, an attempt was made to annul a naturalization decree on the ground that the naturalized individual was a minor at the time of naturalization. The court ruled (at 630): "We would like to arrive at the conclusion which was reached by the trial court, and thereby prevent Wallace or anyone else from profiting by the fraud which he perpetrated upon the court which made the order admitting him to citizenship, but we cannot consistently do so in the view which we take of the law. The rule is that where a certificate of naturalization is granted by a court of competent jurisdiction, the evidence is not admissible to show that it was improperly granted or was obtained by false and perjured testimony. In *People* v. *McGowan*, *supra*, an appellate court ruled (at 646) that a trial court made no error in excluding evidence of false representation in a naturalization proceeding "upon the principle that such a record, like any other judgment of a court, affords complete evidence of its own validity. In proceedings of naturalization, matters are submitted to the decision of the court, and the presumption will

be indulged the court heard evidence, was satisfied the applicant had complied with the law, and its findings must be held conclusive as to all facts recited in the record."

In *Scott* v. *Strobach, supra*, a collateral attack upon a judgment of naturalization based upon technical grounds was rejected because the judgment was complete evidence of its own validity. The court stated (at 490): "The alien must, and it is intended that he should, confidently rely on [the judgment's] inviolability." Otherwise "its value and dignity is lessened; and that which our statutes and laws teach him to regard as inestimable would degenerate into a fruitful source of vexation and litigation. We must hold the certificate of naturalization free and exempt from all collateral impeachment, no matter though it is inferred that fraud and perjury were involved and committed in its procurement."

5. In order to impeach a judgment of naturalization on the ground of fraud, there must be alleged and proved the kind of fraud which would move a court of equity to invalidate any judgment out of term. See *United States* v. *Norsch, Behrensmayer* v. *Kreitz, People* v. *McGowan, Scott* v. *Strobach, Tinn* v. *United States District Attorney, In re McCoppin*, all *supra*. *There is no case which holds that a mere false statement made in connection with the proceedings themselves is sufficient to obtain equitable relief from a judgment of naturalization.*

The statute thus rests upon and declares a body of decisional law which insists that only extrinsic fraud can vitiate a judgment. There are further reasons arising from the statute itself which support this conclusion.

D. The Scheme and Purpose of the Statute Corroborate the Contention that Findings of Attachment Are *Res Judicata.*

For 104 years prior to 1906, the federal and state courts knew only that an applicant must execute a declaration of intention renouncing prior allegiance; that after five years' residence he might apply for final naturalization provided he had filed his declaration of intention to become a citizen at least two years before the application for final naturalization; that only courts with common law jurisdiction and with both a seal and a clerk enjoyed jurisdiction over naturalization proceedings; that it must appear to the satisfaction of the court that the applicant had resided in the United States for five years, during which time he had behaved as a man of good moral character attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

Problems of draft evasion, self-expatriation and foreign embarrassments marked the first stirrings of difficulty with the naturalization process. The election frauds of 1868 brought in their wake a host of new difficulties. Thousands of individuals in New York alone received naturalization certificates in the few weeks preceding the election. See *In re Coleman*, Fed. Cas. No. 2980, 15 Blatchf. 406 (C. C. N. Y. 1879); *Commonwealth* v. *Paper*, 1 Brewst. 263 (Phil. 1868). Prior to the passage of the Act of 1906, most of the attempts to redress frauds took a criminal rather than a civil form.*

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* There are references in the legislative history to some 1,916 civil cancellation cases. See *Bindczyck* v. *Finucane*, *supra*. We have been unable to discover any other record of these cases.

The primary concern of the drafters of the legislation was the prevention of what was repeatedly referred to as "gross frauds".* These frauds were not, with the exception of misrepresentations concerning a *bona fide* intention to reside in the United States, deceptions concerning mental attitude of attachment, but rather disregard, frequently with the connivance of the court clerk, of procedural requirements and misrepresentations as to simple matters of fact, such as date of arrival, and identity. The Congress had to find a way of circumventing the politicians and their allies who had brought about the naturalization of aliens who were unable to comply with the simple conditions laid down in R. S. Section 2165.

Congress solved the problems with which it was confronted in this area in two ways, each of which throws light on the issue here in focus.

1. The Investigative and Litigated Character of the Naturalization Process Emphasizes the Propriety of Attaching Finality to the Judgment and Finding of Attachment.

Beginning with the Act of 1906 and continuing into the period here in issue, Congress engrafted onto the naturalization process a system of enforcement in order to prevent the evils of improper naturalization. In 1906, the heart of the system was the creation of an administrative agency to police the statute; the provision for a ninety-day waiting

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* The tale is familiar to the Court. See *Schneiderman* v. *United States*, 320 U. S. 118, 133, note 12, and *Bindczyck* v. *Finucane*, *supra*.

period;* and the provision in Section 11 for representation of the government's interest. See *Bindczyck* v. *Finucane, supra;* 40 Cong. Rec. 3643, 3645.

* See the testimony of Commissioner Hunt, *Hearings, supra,* p. 10, who stated that "the main point of this bill—what we may call our discovery—is the petition of naturalization." He went on to explain:

> "Heretofore there has been the declaration of intention made at any time, anywhere, without any previous inquiry, and we propose to abolish the declaration of intention and substitute for it a petition of naturalization made three months before the naturalization occurs and to be made in the same court in which the naturalization occurs, the petition to have all the salient facts set forth, not merely the ex parte statement of the applicant, but to have the facts he intends to prove before the court set forth in the petition. That petition will be made in duplicate and one copy is to be sent here to the Bureau of Naturalization.
>
> "Now, the Bureau of Naturalization, having this before it, knows that John Smith has applied for naturalization before such and such a court; that he will be examined for naturalization at such and such a time; that he came from such and such a place at such and such a time, and has resided at such and such places in the United States since coming here; so that the Government in Washington will be completely forearmed when John Smith comes before the court to be naturalized.
>
> "It will have time, even, to send abroad to find out whether the facts he states about his birth are true, and it can go into court then with full information to contest that naturalization if it chooses to do so; whereas now it gets no word of any naturalization at all, and under the previous bills looking to the reform of the naturalization laws it has been provided after the naturalization has been conferred the copies of the records and the report on it shall be sent to the Bureau of Naturalization. What is the use of that? It is too late. Now, if you get this petition, stating everything the man intends to show, three months before, then it is the Government's own fault if there are any frauds."

According to the chairman (*Hearings, supra,* p. 20) the purpose of the waiting period was "in order to enable the agents of the Bureau of Naturalization to make an investigation, so that they can present to the court any objections that may exist to the naturalization of a party."

Subsequent to the Act, the enforcement procedure was expanded and regularized. During the period of time relevant here, the applicant was subjected to the following course of investigation for purposes of verifying his qualifications and litigating them where necessary:

a. While still in the country of his origin, the applicant was required to obtain an immigration visa and a quota number from the American consul who could refuse it, if the alien was inadmissible or ineligible for citizenship. 8 U. S. C. Sec. 202; 43 Stat. 153; 43 Stat. 176.

b. After his arrival in the United States, the alien is again subject to examination by at least two immigration inspectors who have the power to subpoena witnesses, take evidence, administer oaths, and to refuse admission if the alien is inadmissible or ineligible for citizenship.*

c. Subsequent to his arrival, the alien is required to fill out in writing a "Statement of Facts and Preliminary Form for Declaration of Intention," a form secured from the office of the Immigration and Naturalization Service and filed with the service.**

d. The Immigration and Naturalization Service then attaches to the executed statement and preliminary form referred to in the preceding paragraph, the applicant's certificate of arrival, and forwards both to the clerk of the court where the applicant is to be naturalized. There-

* See Act of May 19, 1921, 42 Stat. 5, as amended May 11, 1922, 42 Stat. 540, as amended by Sec. 2 of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C., Sec. 202, and Act of February 5, 1917, Chapter 29, Section 16, 39 Stat. 885, 8 U. S. C., Sec. 152. Under these provisions the examination by the Consul and the Immigration Inspectors covered all of the alien's qualifications for citizenship, including such matters as whether or not he was an anarchist or a believer in organized government.

** See Rule 6, Naturalization Regulations of July 20, 1935, 8 C. F. R. 385.

after, the applicant executes a Declaration of Intention (Form No. 2202), in which he states under oath that he was not an anarchist nor a polygamist nor a believer in the practice of polygamy and that it was his intention in good faith to become a citizen of the United States and permanently reside here. This declaration is made in the office of the clerk.

e. Subsequent to the filing of the declaration of intention by a period of not less than two nor more than seven years, the applicant is required to execute another form which at various times in the period at issue was known either as an Application for a Certificate of Arrival and Preliminary Form for Petition for Citizenship (Form A-2214) which included a "Statement of Facts to be Used in Filing My Petition for Citizenship", or a consolidated version of these papers headed "Statement of Facts and Preliminary Form for Petition for Naturalization." See Naturalization Regulations of January 1, 1932, Rule 3, and compare Naturalization Regulations of July 20, 1935, Rule 6.

f. The above form is left with the Immigration and Naturalization Service for its investigation, and after completion of the investigation, the applicant is notified to appear with two witnesses before an Immigration and Naturalization Service examiner.*

g. Upon notice he appears with his witnesses to be examined under oath. The witnesses, each of whom must be a citizen of the United States, attest to the fact that the applicant is a person of good moral character and attached to the principles of the Constitution of the United States. If the examining authorities are satisfied on the basis of

* See Rule 7, subdivision A of the Naturalization Regulations of July 20, 1935.

their prior investigation and subsequent examination that the applicant possesses the necessary qualifications, a petition for citizenship is prepared in triplicate (Form No. 2204 LA) in which the applicant again states that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he is not a polygamist; that he is attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. The attached affidavits of the two witnesses state their personal knowledge concerning the applicant's continuous prior residence in the United States, his good moral character, his attachment to the principles of the United States Constitution and his general qualifications for admission to citizenship.

h. This petition for citizenship, executed with the cooperation and approval of the Immigration and Naturalization Service, is filed by the applicant with the clerk of the court and both he and his witnesses are put under oath and sworn.

i. Subsequent to the filing of the petition, the applicant in certain instances, might again appear before a "designated" examiner, appointed by the court, for further examination under oath.*

j. If the designated examiner makes favorable findings, a conditional recommendation for citizenship is made and the applicant is notified to appear in court on 30 days' notice for final hearing. The notice may also state any objection the Service has to his naturalization and witnesses or facts that it desires to bring to the attention of

* The designated examiner system was initiated in 1926, see Act of June 8, 1926, 44 Stat. 709, 710, now Section 333 of Nationality Act of 1940.

the court. These issues are litigated before the court at the final hearing, which prior to the Nationality Act of 1940, took place no less than 90 days subsequent to the filing of the petition for citizenship.

k. Where the recommendation is favorable, at the final hearing a motion for admission of the applicant to citizenship is made by the representative of the Immigration and Naturalization Service upon the findings theretofore filed, and if the motion is granted, the oath of allegiance is taken, the order of naturalization is entered, and the certificate is issued by the clerk.

l. If the applicant is admitted over the objection of the government, or if it subsequently entertains doubts about his qualifications, it may appeal.

Prior to the statute, the naturalization trial was quite perfunctory. Indeed, in many instances it was a mere parody of a judicial trial. Yet no court ever found in this circumstance a reason for questioning the finality of the judgment. The elaborate mechanisms for verifying, contesting and litigating the claims of the applicant which were inaugurated by the statute supply special justification —if one were needed—for the application of the principle of *res judicata*.

2. The Addition to the Statute of "Illegal Procurement" as a Ground for Cancellation.

Congress not only endowed the naturalization process with a truly adversary character, but, as part of the statutory plan for a uniform system for prevention of improperly granted citizenship, deprived the naturalizing court of discretion in dealing with procedural matters (Section 4), the "manner" in which the alien complied

with the prescribed process.* And in harmony with this intention it made it possible to police judgments which had been issued in disregard of the basic procedures and thus "illegally procured" (Section 15).

This ground of cancellation is based upon the equitable remedy of error apparent on the face of the record, just as the relief for fraud was to be implemented by the equity bill of review procedure.**

But illegal procurement does not (and was not intended to) cover the same area as fraud. To view the former as the substitute for the latter minus false representation and scienter would violate not only the canon against redundancy in interpretation but would ignore the theretofore well-established and clearly understood distinction in equitable remedies between a bill of review for relief from extrinsic fraud and a bill for error apparent.***

The illegal procurement sanction was obviously intended to apply to disregard or omission of procedural matters, while the extrinsic fraud sanction alone could impeach a finding of attachment or belief. The former could be established objectively from the record of the proceeding itself, while the latter was addressed to matters outside the record.

The omission of procedural matters was not cured by the judgment because they were indispensable prerequisites to the exercise of the power to naturalize. But the essence of the judicial power, the area in which the judgmental

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* See the Commissioners' Report, *supra*, Appendix E, pp. 85-86, "Report of C.V.C. Van Deusen, Special Examiner of the Department of Justice on matters relative to Naturalization." "The conclusion is therefore inevitable that if fraud is to be successfully legislated against such legislation must include * * * a simple and comprehensive code of procedure * * * that will leave to the judges the least latitude consistent with the strict enforcement of the law."

** See 7 Moore, *Federal Practice*, Sec. 60.15.

*** See 7 Moore, *Federal Practice*, Sec. 60.24.

function is uniquely involved, is the determination of attachment and allegiance. It would truly create a "jurisprudence of labels" to insist that the conclusion which the court must ultimately reach by weighing evidence, resolving conflicts and assessing sufficiency, is a jurisdictional or a procedural prerequisite to its power to reach it.

Besides, on the very surface there is a qualitative difference between the relatively simple determinations which have been treated as impeachable for illegal procurement * and determinations of attachment and allegiance. For, these latter, as the Court well knows (see *Schneiderman* v. *United States, supra,* and *Baumgartner* v. *United States,* 322 U. S. 665) involve not only highly subjective elements but objective ones which cannot be resolved without profound regard for important public values, national traditions and constitutional limitations.

The denaturalization process itself is compounded of those matters which are procedural and transitory and those which are permanent and substantive. The underlying purpose of the former is to aid the court in reaching sound conclusions with respect to the latter—attachment, allegiance and good moral character. The identification of these latter findings with the judicial process enjoys a

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* Instances of those indispensable prerequisites to the naturalization process, the omission of which will give rise to an action in illegal procurement, are the requirement of filing of a certificate of arrival, *Maney* v. *United States,* 278 U. S. 17; *United States* v. *Ness,* 245 U. S. 319; the requirement of a hearing in open court, *United States* v. *Ginsberg,* 243 U. S. 472; the requirement that the witnesses be subjected to examination under oath, *United States* v. *Leles,* 227 Fed. 189 (D. C. Cal.); the requirement of Section 11 dealing with the right of the United States to call witnesses, *Milder* v. *United States,* 284 Fed. 571, 572 (C. A. 8); the requirement that the two verifying witnesses be United States citizens, *United States* v. *Martorana,* 171 Fed. 397 (C. A. 3); and the requirement of the renunciation by name, rather than generally, of a state or sovereignty of which the alien was a citizen or subject, *Ex parte Lange,* 197 Fed. 769 (D. C. Mo.).

genealogy as old as the Republic itself. See *Stark* v. *Chesapeake Insurance Co.*, 7 Cranch 420, and *Campbell* v. *Gordon*, *supra*. No design to obliterate this deeply-rooted distinction can be attributed to the framers of the Act—if for no other reason than that it would strip the judicial process, root and branch, of its distinctive function in this area and result in a violation of Article III of the Constitution.

E. The Post-Statutory Cases Confirm the Validity of Our Contentions.

What we have been saying with respect to the finality of the judgment of naturalization in its relationship to the findings of attachment, allegiance and good moral character is, we believe, fully supported by the Court's interpretation of the 1906 statute.

The first decision of the Court dealing with the doctrine of *res judicata* as it relates to naturalization is *Johannessen* v. *United States*, 225 U. S. 227. In that case the defendant admitted to the government in 1908 that in 1892 the testimony of his two witnesses in respect to his residence was perjured. The government brought a proceeding for his denaturalization, alleging that the certificate was illegally procured. The Court held that the original 1892 judgment did not bar the subsequent proceeding under the principle of *res judicata* on the ground that the naturalization proceeding in 1892 was not in reality a "judicial proceeding".

The Court then went on to state, "What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us." The Court pointed out that if a naturalization proceeding were not completely *ex parte*, then the principle of *res judicata* would apply. Mr. Justice Pitney developed this concept for the Court:

> "What we have to say relates to such a case as is presented by the present record, which is the ordinary

case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the government, and without opportunity, to say nothing of duty, on the part of the government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship. In view of the great numbers of aliens thus applying at irregular times in the various courts of record of the several states and in the Federal circuit and district courts throughout the Union, and bringing their applications on to summary hearing without previous notice to the government of the United States or to the public, it is, of course, impossible that the public interests should be adequately represented, and in our opinion the sections quoted from the Revised Statutes are not open to any construction that would give a conclusive effect to such an investigation when conducted at the instance of and controlled by the interested individual alone.

"The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court 2 Black, Judgm. Sections 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. Ed. 355, 377, 18 S. Ct. Rep. 18:

> 'That a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'

"Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured *ex parte* in the ordinary way, any conclusive effect as against the public."

The impact of the Court's rationale in *Johannessen* upon the present case is emphasized by its discussion of

United States v. *Throckmorton*, 98 U. S. 61. The *Throckmorton* decision holds that issues of fact litigated in a patent proceeding were *res judicata* in a later proceeding even against a claim of fraud where the fraud was grounded upon the identical factual issues already litigated by the original court. Mr. Justice Pitney, in the *Johannessen* case distinguished the opinion in *Throckmorton* by once again stressing the *ex parte* character of the naturalization proceeding in effect in 1892:

> "United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, is not opposed in principle, for as pointed out in United States v. Minor, 114 U. S. 233, 241, 29 L. Ed. 110, 113, 5 S. Ct. Rep. 836, the patent was issued on the confirmation of a Mexican grant after judicial proceedings, where there were pleadings and parties, and witnesses were examined on both sides, with the right to appeal. Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929, 931, was likewise a contested case in the Land Department, as the report shows.
>
> "The doctrine that a patent issued *ex parte* may be annulled for fraud has been repeatedly applied to patents for inventions. United States v. American Bell Teleph. Co., 128 U. S. 315, 361, 32 L. Ed. 450, 459, 9 Sup. Ct. Rep. 90; American Bell Teleph. Co., 167 U. S. 224, 238, 42 L. Ed. 144, 153, 17 Sup. Ct. Rep. 809."

Mr. Justice Pitney concluded by emphasizing the *ex parte* character of the proceedings for naturalization then before the Court:

> "The act does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are *ex parte* and conducted by the applicant for his own benefit."

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IN THE

Supreme Court of the United States

October Term, 1957

No. 72

STANISLAW NOWAK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR THIRTY-TWO NATURALIZED CITIZENS *AMICI CURIAE*

Interest of *Amici Curiae*

This brief, the filing of which has been consented to in writing by both parties, is submitted on behalf of thirty-two individuals, all of whom are the subject of denaturalization proceedings which are in various stages of litigation ranging from complaint to appeal. We believe that certain issues presented by this case are importantly involved in the proceedings pending against the *amici curiae*. These issues are (1) the extent to which a naturalization decree is *res judicata* of the issues therein determined; (2) the kind of allegations necessary to support an affidavit of good cause under Section 15 of the Act of June 29, 1906, and (3) the impact of the First Amendment's guarantee of free speech, press and assembly upon denaturalization proceedings.

Summary of Argument

This proceeding is typical of a large number of proceedings filed against naturalized citizens upon the theory that at the time of naturalization they had a relationship to the Communist Party which made their representations concerning allegiance and attachment knowingly false. The theory of the government rests upon simple fraud *inter partes* and not upon the kind of extrinsic fraud which alone can serve to impeach a judgment. Thus, if the government's theory is wrong, its entire case must fall because all of the separate representations upon which the government relies are merged in the ultimate finding of allegiance and attachment which, we contend, cannot be reexamined because it is concluded by the principle of *res judicata*.

I

The Naturalization Act of 1906 which governs this proceeding and those in which the *amici* are involved contains unanswerable indications that the universal principle of finality of judgments was to be respected.

The silence of Congress, in the face of the well established nature of the principle of finality (*Tutun* v. *United States*, 270 U. S. 568), imposes upon the government a strong burden of explaining how a special exception was made of a universal rule. The decision to commit naturalization to the judicial process, the constitutional questions which would be raised by a contrary conclusion, the frustration of the purpose of uniformity, and the insistence upon a requirement of an affidavit of good cause, all support our contention that finality was intended.

This contention is reenforced by the legislative history of the statute which shows that while a separate proposal for reexamining preexisting judgments was rejected, the fraud provisions of Section 15 were to be governed by principles of law then obtaining.

These principles proclaim that a judgment of naturalization could not be attacked or revoked after the lapse of the term without a showing in an affidavit of good cause of extrinsic fraud.

In order to prevent the improprieties at which the statute was directed, it provided for an elaborate course of investigation, verification and adversary litigation. These provisions supply special justification for the application of the principle of *res judicata*, for they establish the litigated character of the findings in issue. The important statutory purpose of uniformity of application was further implemented by depriving the naturalization court of discretion to waive important procedural matters and adding illegal procurement as a sanction for policing the judgment.

But this sanction applies to an altogether different area than fraud. Borrowed from the equity bill for error apparent on the face of the record, it was designed to deal with those procedural matters which had been improperly waived or disregarded by the court. It is manifestly not a sanction which will permit reexamination of findings of attachment and good moral character which peculiarly involve the exercise of the judicial process and with which, since the beginning of the Republic, they have been uniquely identified.

The decisions of the Court from *Johannessen* to *Knauer* support our contention that whether the cause of action be termed legal procurement or fraud, *res judicata* prevents a reexamination of findings of attachment and good moral character since they have been litigated.

II

Important considerations drawn from the domain of due process, as well as the First Amendment, make special demands for the finality of findings dealing with attachment and belief. See *United States* v. *Minerich*, C. A. 7,

No. 12005, decided December 5, 1957. This Court has warned, both in the denaturalization area as well as elsewhere, about the dangers of construing statutes retroactively so as to penalize conduct lawful at the time it was engaged in. Communists are not an excluded group under the Act. The legislative history shows that Congress did not intend, during the periods of time here in issue, to make membership in the Communist Party relevant to naturalization. And the Naturalization Service itself has never so construed the statute.

The only question specifically dealing with organizational affiliations of the kind relevant here is Question 28 in the preliminary form of petition. This deals with all forms of anarchy alone and not with communism. The fact that nowhere in its manifold forms and regulations does the Service make communism relevant to naturalization is clear evidence that the government is now retroactively injecting a new ground into the naturalization process. This contention is supported not only by the negative evidence of the silence of the Service, but by the fact that there is a deep cleft between anarchy and communism, and that at least during all times relevant here, membership in the Communist Party could be treated merely as evidence of political unorthodoxy, but little more. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244.

Not only does abandonment of finality thus introduce a serious due process question into the administration of the statute, but it impairs the political freedom of the naturalized citizen. The retroactive application of the statute, when coupled with the government's insistence that lapse of time is irrelevant to its right to relief, converts the whole denaturalization process into a form of purge, activated whenever it suits the government's convenience. This allows the government to use the denaturalization process to pick off those naturalized citizens whose activ-

ities are offensive to it and imposes upon all naturalized persons the inevitable self-censorship which comes with the knowledge that such activities may lead to the destruction of a lifetime's achievements.

The disregard of the passage of time, moreover, creates insuperable difficulties for the individual seeking to defend his attachment and allegiance. While the government has the ever ready aid of professional witnesses and informers who will swear to anything, the defendant is confronted with insurmountable difficulties in his own preparation. His original witnesses may be dead or intimidated into silence, and apart from this, the issues, normally treacherous and difficult of proof, become insuperably so after the lapse of a long time period. In short, the government's delay increases the likelihood of error in the new trial to the point where equity should not grant relief.

III

The affidavit of good cause is totally defective in that it lacks all of the allegations which it was intended should be set forth by the government to show that good cause in fact exists for setting aside the judgment. These include extrinsic fraud, the fact that the plaintiff did not really know the facts and was therefore deceived, and the manner in which he was injured by the misrepresentation. The affidavit also lacks averments as to the time when the alleged fraud was discovered and subsidiary allegations of prompt recourse. The omission of the latter allegations alone would make the affidavit insufficient.

The Theory of the Denaturalization Proceedings Involved Here

The denaturalization proceedings in which *amici curiae* are involved are unified by the same theory which grounds this proceeding. The government claims that an alleged concealment by the applicant for naturalization of his membership in the Communist Party vitiates the judgment of naturalization and requires cancellation of the naturalization certificate on the ground of fraud and illegal procurement. Specifically, it is claimed that the applicant's relationship to the Communist Party with knowledge of its allegedly subversive purposes resulted in knowingly false representations and undertakings by the applicant in the following respects:

> (a) That he fully believed in the form of government of the United States; that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country.
>
> (b) That he was not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and that he would renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of which he was a subject.
>
> (c) That he would support and defend the Constitution and laws of the United States of America against all enemies foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion.

The representations set forth in (a) above are in response to Questions Nos. 23 and 28 * of a document called Preliminary Form for Petition for Citizenship which the applicant for citizenship is required to fill out, before he is permitted to file his Petition for Citizenship. The latter document contains the representations set forth in (b) above,** while the undertakings set forth in (c) are drawn from the oath which the applicant takes at the conclusion of the naturalization proceeding.

In this case petitioner was naturalized under the Act of 1906. Because of this fact and because a large number of the *amici curiae* were naturalized under it, we confine our discussion to this statute. In this case, the district court refused to find that petitioner had been specifically asked whether he was a member of the Communist Party. In most, if not all, of the complaints filed against the *amici curiae*, there is no allegation that the applicant was specifically asked orally whether or not he was a member of the Communist Party. This brief therefore confines itself to the government's case as typically pleaded.

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* Question 23 reads as follows: "Do you fully believe in the form of government of the United States?" Question 28 is in two parts: "Are you a believer in anarchy?", followed by "Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?"

** Attached to the petition are also affidavits of two witnesses to the effect that to their personal knowledge the applicant during his residence in the United States has been "a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

I

Findings by a Naturalization Court of Attachment to the Principles of the Constitution and Good Moral Character Are *Res Judicata*

If, as we contend, the findings by the naturalization court in this case of attachment to the principles of the Constitution and good moral character are subject to reexamination for only those reasons which would justify an attack upon the finality of a judgment in any other case, then the decision below must be reversed. This is so because:

(1) All of the requirements relating to belief in the form of government of the United States, membership in an organization advocating the overthrow of existing government in this country and the promise to renounce fidelity or allegiance to a foreign prince or sovereignty are merged in the judgment of naturalization and finding of attachment to the principles of the Constitution.*

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* The district court in this case apparently made no finding that the oath was false. Hence we do not discuss in this brief the extent to which it is protected by the judgment. See *Knauer* v. *United States*, 328 U. S. 654. We think it important to point out that the oath is administered only after the court is satisfied that the applicant is qualified. The fact that the oath was administered raises without more the presumption that the court "before whom the oath was taken, was satisfied as to the character of the applicant." *Campbell* v. *Gordon*, 6 Cranch 176, 182. Obviously, an attack on the falsity of the naturalization oath cannot serve to circumvent the finality of the finding of attachment and must be based upon some extraordinary showing of conduct subsequent to the taking of the oath of a kind outside the realm of constitutional protection which would make its falsity demonstrably clear. Compare Chafee, *Free Speech and the United States* (1941), p. 373.

(2) The fraud alleged and proved by the government in this case is inadequate to destroy the finality of the judgment and finding.*

A. Section 15 of the Act of 1906 Was Not Intended to Destroy the Finality of Judgments of Naturalization.

No one questions the fact that the certificate of naturalization rests upon a judgment which, like every other judgment, is the product of the judicial process and is subject to appeal. *Tutun* v. *United States*, 270 U. S. 568. Yet in order to prevail in this case, the government must establish that Section 15 of the Act of 1906 was framed to establish a special exception to the universal principle of finality of judgments. We believe this contention to be wholly without merit and that all of the available guides overwhelmingly establish that Section 15 of the statute must be construed and applied within the framework of the doctrine of *res judicata*. We deal here with the considerations which project from the surface of the statute, indicating that there was no intention to abandon the established principle that matters which were litigated in the naturalization proceeding were not to be subjected to reexamination except for the reasons which would operate to reopen any judgment.

At the outset, it must be emphasized that there is not a syllable in the language of the statute which supports a rejection of *res judicata*. Affirmatively, the statute commits naturalization to the judicial process where it had lodged for over 110 years previously. The legislative history is fertile with reassurances by the sponsors of the legislation that there was no intention to depart from the basic principles which had taken root in this area. Thus,

* We discuss below the contention that the representations complained of do not give rise to a charge of the kind of fraud which will vitiate a judgment.

the final report of the House Committee which considered the bills (H. Rep. No. 1789, 59th Cong., 1st Sess., 1906) stated (at p. 3):

> "Your committee has not sought to make any radical changes in the principles of existing law * * *."

See also 40 Cong. Rec. 3646, 7874.

In *Tutun*, this Court held that appellate review was so ingrained a part of American justice that it was not to be "assumed that Congress denied the right of appeal merely because it did not affirmatively confer it." *Bindczyck* v. *Finucane*, 342 U. S. 76, 87.* Certainly *res judicata* is no less ingrained in our system of justice.**

Moreover, we must see the problem against a setting of its institutional environment and history. Naturalization was historically entrusted to the courts not merely because it was convenient to do so, but because it was deemed more appropriate in a democracy to stabilize naturalization through the safeguards of the judicial process. This was a decision of a fundamental kind by which the young Republic sought to reject the arbitrary exercise of power through the royal prerogative, and subjected it to the rule of law.*** The framers of the statute did not intend to tamper with this long established distribution of power by stripping its exercise of perhaps its most basic attribute, finality.

If the government's contention is to prevail in this case that a judgment of attachment may be reexamined

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* And it must be borne in mind that the bills from which the statute ultimately emerged contained affirmative proposals for judicial review.

** We show in a later section that *res judicata* was deeply ingrained in the naturalization process prior to 1906.

*** It will be recalled that one of the grounds of the Declaration of Independence was that the Crown had in arbitrary ways obstructed "The Laws for Naturalization of Foreigners".

and set aside on grounds other than those which traditionally vitiate judgments, this Court must decide that Congress intended, under Section 15 of the Act of 1906, to attach to the exercise of the judicial power, under Article III of the Constitution, authority to re-examine a judgment after it has become final, by exhaustion of the appellate process or by failure to invoke it. Congress, a body largely dominated by lawyers, was fully aware of the constitutional problems which would be created by legislation exposing the finality of judgments to attack. Indeed, they were specifically told that the courts had held that naturalization judgments were final. See *infra*. Why should language be strained, common sense ignored, firmly established traditions uprooted, and a constitutional conflict invited by attributing to Congress an intention to permit the re-examination of the judgment of attachment on the basis of a kind of fraud which had theretofore been deemed inadequate to vitiate a judgment?

The dominating theme of the statute and its legislative history is the insurance of the uniformity and integrity of the naturalization process. These ends were to be achieved by a system of procedural prerequisites designed to prevent improperly granted citizenship through reducing the risk of error and deception in the judicial finding of the ultimate facts of attachment and good moral character. The purpose was to deal with fraud prior to the judgment, not afterward, to police the judgment by prevention rather than by overleaping the then existing modes for reopening a judgment on the ground of fraud. Congress certainly did not intend on the one hand to make naturalization uniform, stable and relatively free from the exercise of discretion, but to make the denaturalizing process arbitrary and capricious by ignoring the stability of judgments and placing each naturalized citizen, until the time of his death, at the mercy of an elastic and undefined system of denaturalization in which judgments theretofore final would become volatile and conditional.

Finally, the requirement in Section 15 of an affidavit of good cause is hardly a routine requirement for the initiation of an action; it typically suggests the showing which had to be made in order to overcome the inertia of a judgment. See, for example, *Craig* v. *Smith*, 100 U. S. 226, and compare *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248.

B. The Legislative History Reflects Congressional Concern for the Stability of the Naturalization Judgment.

The legislative history of the statute supplies an additional reason for concluding that its framers had no intention of eliminating the principle of *res judicata* in relation to naturalization decrees. President Roosevelt's Commission of 1905 * produced a majority and minority bill. The majority bill (H. R. 9964) was drafted by Commissioners Purdy and Campbell, and the minority bill by Commissioner Hunt. Both bills contained provisions for the cancellation of certificates of citizenship.

The majority bill provided in addition, in Section 33, for an elaborate procedure under which certificates of citizenship issued prior to the effective date of the proposed statute were to be registered. This provision made it the duty of holders of pre-statutory certificates to present to the clerk of the court the certificate through which they claimed citizenship, for registration by the clerk. Wherever the certificate was valid on its face, and the clerk had no reason to believe "that the certificate was obtained through fraud or in illegal manner," the clerk was to fill out a form, describing and identifying the holder of the certificate, to be signed by such holder. A duplicate description of the applicant was then to be filled out by the clerk and signed by the applicant, certified by the clerk, and returned to the Bureau of Naturalization.

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* See *Bindczyck* v. *Finucane*, *supra*.

At the hearings,* one of the witnesses, R. P. Morle, the clerk of the United States District Court for the Eastern District of New York, commenting on Section 33, pointed out (at p. 14) that a naturalization decree was a judgment, and citing *Spratt* v. *Spratt*, 4 Pet. 393, stated: "I do not see from the decision of the Supreme Court how a legislative body can set aside a judicial court judgment." Similarly, another witness attacked the proposal on the ground that *Spratt* v. *Spratt* had held that a naturalization judgment was "complete evidence of its own validity." After the proposal was objected to by one of the members of the Committee, Congressman Adams, on the ground that it would be "an impairment of contract", and by another, Congressman Wood, who asked "should not the thing under the seal of the court be accepted as the best evidence" (Hearings, p. 49), it was dropped. And on the floor of the House, during the final debate on the bill, Congressman Bonynge, the manager of the bill, assured Congress that the companion provision for cancellation of the naturalization judgment was declaratory of then existing law (40 Cong. Rec. 7874). We turn now to a consideration of the law relating to the finality of naturalization judgments prior to the Act of 1906.

C. The Pre-Statutory Decisions Dealing With Naturalization Judgments.

An analysis of the federal and state cases dealing with the character of the naturalization judgment prior to the Act of 1906 establishes the following:

1. *Naturalization operates only through the exercise of the judicial process and results in a judgment.* See *Spratt* v. *Spratt*, *supra*; *Campbell* v. *Gordon*, *supra*; *United States* v. *Gleason*, 78 Fed. 396 (C. C. N. Y. 1897),

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* 59th Cong., 1st Sess. Hearings before the House Committee on Immigration and Naturalization on the Bills to Establish a Bureau of Naturalization and to provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States.

The effect of the *Johannessen* opinion upon the present proceedings is clear. The naturalization process embodied in the 1906 statute under which present petitioner was naturalized is, of course, in no sense an *ex parte* proceeding. In *Johannessen* Mr. Justice Pitney pointed out that the proceedings were "without notice to the government," that they were "without opportunity, to say nothing of duty, on the part of the government to appear," and that therefore it was "impossible that the public interest should be adequately represented" in investigations "conducted at the instance of and controlled by the interested individual alone."

The naturalization proceeding in effect at the time of petitioner's naturalization was a proceeding, as the Court has pointed out, in which a decree was "entered after an opportunity to be heard." Moreover, "notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on"; "the hearing on the petition was to take place in open court"; "the United States had the right to appear, to cross-examine petitioner and his witnesses, to introduce evidence and to oppose the petition." Moreover, the government "had the right to appeal from the decision granting naturalization." *Schneiderman* v. *United States*, *supra*, at 123. This proceeding, therefore, was precisely the reverse of the *ex parte* proceeding described in the *Johannessen* case. Applying the rule laid down in *Johannessen*, this naturalization proceeding is one in which the doctrine of *res judicata* has full play.

The next decision of the Court to touch upon the principle of *res judicata* was *United States* v. *Ness*, 245 U. S. 319. In this case the government sought to denaturalize an individual who obtained a decree of naturalization without an attached certificate of arrival. The issue before the Court was whether the original decision in a state court

on the adequacy of the naturalization certificate was *res judicata* as to the denaturalization proceeding. The Court by Mr. Justice Brandeis held that while a decision on "competency or weight of evidence or the credibility of witnesses" is conclusive against the United States, the doctrine of *res judicata* is not applicable to illegality in procurement involving the total absence of a jurisdictional prerequisite such as lack of a certificate of arrival, since the government had no direct review of a naturalization judgment entered in a state court.

The limited character of this holding relating to a judgment in a state court was emphasized by Justice Brandeis in a later opinion in *Tutun* v. *United States*, 270 U. S. 568. In the *Tutun* case the Court faced the question whether there was an appeal from a naturalization judgment in a federal court. In holding that an appeal lay from the naturalization judgment of a federal district court, Mr. Justice Brandeis distinguished his opinion in *Ness* by pointing out that there "the question under discussion was whether a judgment of naturalization entered by a state court barred as *res judicata* a proceeding brought in a federal court under Section 15 to cancel the certificate of naturalization."

The combined impact of the *Johannessen*, *Ness* and *Tutun* cases upon the applicability of *res judicata* in a denaturalization proceeding is clear. If a naturalization proceeding is not *ex parte* and if appellate review is available to the government from the original judgment, the normal principles of *res judicata* must be applied. Since the present naturalization proceedings are *not ex parte*, and since a judgment of a federal court in a naturalization proceeding is appealable, the normal rules of *res judicata* apply and findings of fact such as attachment to the

Constitution and allegiance to the country may not be relitigated.*

The next decision of the Court to advert to the principles of *res judicata* is *Schneiderman* v. *United States*, *supra*; where a judgment for the plaintiff in a denaturalization proceeding was reversed. While the petitioner had raised "the nature and scope of the government's right in a denaturalization proceeding to re-examine a finding and judgment of attachment upon a charge of illegal procurement," the Court specifically did not reach this question and left it unanswered, holding that in any event the Government had failed under the applicable rules of evidence to prove lack of attachment. The Court left open the question "whether under the Act of 1906 as it was in 1927 the Government * * * can secure a *de novo* re-examination of a naturalization court's finding and judgment that an applicant for citizenship was attached to the principles of the Constitution," stating that "we do not consider these questions" (at 123-124).**

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* There is no contradiction of this principle in the holding of the Court in *Maney* v. *United States*, 278 U. S. 17. In this case a naturalization judgment was entered without the necessary certificate of arrival. The district court permitted it to be filed *nunc pro tunc*. The Court upheld a petition for denaturalization on the ground of illegal procurement, stating that the judgment attacked did not make the matter *res judicata* since the judgment on its face revealed that the court below had no jurisdiction to grant citizenship. Hence this was not a situation in which relitigation of findings of fact was prohibited. It was a conventional voiding of a judgment invalid on its face.

** Although the majority opinion in *Schneiderman* did not reach the question of *res judicata* because of its disposition of the case on the ground of failure to present clear and convincing proof, it indicated in Footnote 3 (at 124) that a decree of naturalization "even though the United States does not appear, cannot be compared (as was done in *Johannessen* v. *United States*, 225 U. S. 227, 238) to an administrative grant of land or of letters patent for invention, and that the permissible area of re-examination is different in the two situations."

In his concurring opinion in *Schneiderman*, Mr. Justice Douglas pointed out that the finding by the district court that the applicant has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, is "the condition precedent" to naturalization," not the weight of the evidence underlying the finding" (at 162-163). Mr. Justice Douglas concluded therefore that a finding of attachment cannot be set aside by a re-examination or relitigation of that finding in a subsequent proceeding. Mr. Justice Douglas went on to explain the importance of applying the principle of *res judicata* to findings of attachment in naturalization judgments (at 165):

> "If findings of attachment which underly certificates may be set aside years later on the evidence, then the citizenship of those whose political faiths become unpopular with the passage of time becomes vulnerable. It is one thing to agree that Congress could take that step if it chose. See Turner v. Williams, 194 U. S. 279, 24 S. Ct. 719, 48 L. Ed. 979. But where it has not done so in plain words, we should be loath to imply that Congress sanctioned a procedure which in absence of fraud permitted a man's citizenship to be attacked years after the grant because of his political beliefs, social philosophy, or economic theories. We should not tread so close to the domain of freedom of conscience without an explicit mandate from those who specify the conditions on which citizenship is granted to or withheld from aliens. At least when two interpretations of the Naturalization Act are possible we should choose the one which is the more hospitable to that ideal for which American citizenship itself stands."

The opinion of the Court in *Baumgartner* v. *United States*, *supra*, on the question of the applicability of the principle of *res judicata* to naturalization judgments is very similar to that of the majority in *Schneiderman*. As in *Schneiderman*, the Court did not reach the effect of the principle of *res judicata* since it found that in any event the government did not sustain the high burden of proof required in denaturalization proceedings.

The most recent opinion of the Court adverting to this problem is *Knauer* v. *United States*, 328 U. S. 654. In this case the government sought to denaturalize the defendant on the ground of fraud in the naturalization oath. The defendant urged that the issue of fraud in the oath was *res judicata* in the judgment sought to be set aside. In disposing of this question adversely to the defendant, the Court, by Mr. Justice Douglas, once again specifically pointed out that it was not ruling on "the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization." However, the rationale adopted by the Court completely supports our contention that litigated findings of fact are *res judicata* against subsequent attack. The Court pointed out (at 670-671):

> "An analogy is sought to be drawn to those cases where relief against a prior judgment, on the ground that perjured testimony was introduced at the trial, was denied. United States v. Throckmorton, 98 U. S. 61, 66, 25 L. Ed. 93. And see Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 421, 43 S. Ct. 458, 464, 67 L. Ed. 719. But that rule goes no further than to say that the issue of fraud can become res judicata in the judgment sought to be set aside. We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made conditions precedent to naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires foreswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant to citizenship. Hence, no opportunity ex-

> ists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become res judicata in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated."

The application of the Court's rationale in *Knauer* to the present case is clear. Here the government seeks to relitigate findings relating "to the past—to behavior and conduct." These are findings of fact involving the taking of evidence. These are findings of fact arrived at after an opportunity for "the examiner or the judge to determine if what the new citizen swore was true, was in fact false." These are findings of fact which have been adjudicated in a prior proceeding. Under the rationale of the *Knauer* case, these findings of fact are *res judicata* against subsequent attack.

The doctrine of *res judicata* has likewise been applied by the lower courts. See *United States* v. *Bischof*, 48 F. 2d 538 (C. A. 2, 1931) affirming *United States* v. *Bischof*, 35 F. 2d 186 (D. C. N. Y. 1929); *United States* v. *Pandit*, 15 F. 2d 285 (C. A. 9), cert. denied 273 U. S. 759; *United States* v. *Kusche*, 56 F. Supp. 201 (D. C. Cal. 1944).

All these cases conclusively establish that both in a cause of action for illegal procurement and a cause of action for fraud the test of the application of the doctrine of *res judicata* is whether the facts upon which the conclusion rests have been litigated. Where these issues of fact have been litigated they cannot be reopened in a subsequent proceeding, whether the proceeding be designated one in illegal procurement or one in fraud. Here the only "fraud" charged is alleged false statements underlying

the very findings of fact which the government seeks to relitigate. The issue as to whether these findings are true or false is foreclosed and cannot be reopened in the absence of extrinsic fraud.*

II

Important policy considerations require the finality of the naturalization judgment.

The conventional reasons for finality (*Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 297; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1) apply with great force to the naturalization judgment. There are due process reasons as well why findings of attachment cannot be re-examined. In addition, the First Amendment makes special demands for the finality of findings dealing with political belief and association. See *United States* v. *Minerich*, No. 12005, decided December 5, 1957 (C. A. 7).

A. The Denial of Finality Creates Serious Constitutional Problems.

The Court has held with respect to the Act of 1906 that "the Act makes nothing fraudulent or unlawful that was honest and lawful when it was done." *Johannessen* v. *United States*, supra, and *Luria* v. *United States*, 231 U. S. 9. And, of course, this assurance was necessary to re-

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* We think it also quite clear that the principle of *res judicata* protects against attack on the ground of illegal procurement, omissions, deviations and deficiencies in the naturalization process which cannot fairly be deemed to be "jurisdictional". See the cases cited in *United States* v. *Kusche*, *supra*, at 210, 214, and the opinion of Judge Hand in *In re Denny*, 240 Fed. 845, 846.

solve the serious constitutional question which would arise if the statute retroactively penalized conduct lawful at the time of naturalization. Compare *United States* v. *Beebe*, 180 U. S. 343; *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421; *United States* v. *Klein*, 13 Wall. 128; *United States* v. *Padelford*, 9 Wall. 531.

The foundation of the charge against petitioner (and against the *amici curiae*) is membership in the Communist Party. The Government does not (and could not) contend that Communists were an excluded group such as anarchists or polygamists (Section 7). However, an alleged relationship to the Communist Party is now claimed to be sufficient to reopen and relitigate the original finding of attachment.

Petitioner has demonstrated at length that the whole course of legislative history in this area shows that Congress did not intend during the periods of time here in issue to make membership in the Communst Party relevant to naturalization. As the Court of Appeals for the Seventh Circuit has recently held in *United States* v. *Minerich, supra*:

> "Regardless of what government witnesses Malkin, Note, Gitlow and Wright described from the witness stand as the communist objective during 1925 to 1928, Congressional disapproval of affiliation with that party remained legislatively inarticulate until recent years and the record before us is silent on the point. But all we mean is that there is no legalistic way, this late in the day, by which we can fairly decide if there was such concealment by Minerich in 1928 warranting 1957 revocation of his citizenship."

It need only be observed here that the many and detailed forms and questionnaires which the applicant was required

to sign did not ask whether he was a Communist. See *supra.**

The only question which specifically probes political beliefs and affiliations deemed relevant to naturalization is Question 28 in the Preliminary Form of Petition. The attempt, years later, to convert Question 28 into one which an alleged Communist could not truthfully answer in the negative is strained and incredible. The purport and scope of the entire question is established by the initial query as to whether the applicant is a believer in anarchy. The question which succeeds it does not advance into a new

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* In *United States* v. *Matles*, No. 13121, a denaturalization case in the Eastern District of New York, Reuben Speiser, a veteran employee of the Immigration and Naturalization Service in the Office of General Counsel, a former naturalization examiner and author of the "Speiser affidavit" of good cause, gave the following testimony about communism as a bar to naturalization (at pp. 2413-2414):

"Q. Sir, in 1934,—in August of 1934—was there any rule, regulation or enunciated policy contained in writing of the Immigration and Naturalization Service of the Department of Labor that one may not be admitted to citizenship by reason of membership in the Communist Party?

* * *

Mr. Gliedman: As a departmental policy, you say?

"Mr. Perlin: Written departmental policy, regulation, or statute applicable to it.

"The Witness: May I answer?

"The Court: Yes.

"The Witness: I do not recall any official document which specifically mentioned the Communist Party as an organization in 1934, to which an applicant for naturalization is prohibited from belonging.

"Q. And that is to the best of your present recollection? A. Yes."

As far as we have been able to discover, there are no official documents of any kind, during the entire period here in issue, which make the applicant's relationship to the Communist Party relevant to his qualifications for citizenship.

area but rather particularizes the basic question concerning anarchy. It thus asks about the applicant's relationship to any organization teaching anarchy or the overthrow of existing government in this country. Manifestly, the introductory part of this second question deals with anarchy as a political or philosophical theory, while the second portion refers to the terrorist version of anarchy, the "propaganda of the deed" for the purpose of permanently ending the rule of the state. This question thus did not ask alternatively about anarchy and communism, but exhaustively about all forms of anarchy alone.

What the language of the statute and legislative history establish, the administrative application and enforcement confirm. And it is hardly surprising that the statute was interpreted by the Service through its forms of interrogation to be confined to anarchists. For the distinction between Communists and anarchists is long-established and deeply-rooted.*

"The internal history of the International Workingmen's Association is the history of this struggle between Proudhonism and the modern Socialism of Marx," the Marxist publicist Plekhanov wrote in 1894.** Following the struggle to overcome the influence of the individualistic anarchism of Proudhon, Marx in the early seventies attacked more and more violently the anarchist wing represented by Bakunin, who, while approving common ownership of land and other means of production, advocated not only the conquest but the destruction of the state. Bakunin

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* We do not discuss here whether the Service would have been authorized to make communism a basis for denying naturalization, in view of the fact that Congress had not done so. (When the statute was passed the Communist Party was not even born in the United States.) Our more limited point is that the Service did not so interpret the statute.

** G. V. Plekhanov, *Anarchism and Socialism*, (tr. Eleanor Marx Aveling; Charles H. Kerr & Co., Chicago, 1907), p. 78.

in turn polemicized against the authoritarian "German Communism." The climax of the conflict was the expulsion of Bakunin from the International Workingmen's Association in 1872. After its Congress of Paris in 1889, the reorganized International carried on a bitter struggle against the anarchist movement. Anarchist organizations and publications were suppressed by the Soviet Government after the Revolution.*

Expressing the violent antipathy of Communists toward the anarchist movement, Plekhanov wrote:

> "The Anarchists are Utopians. Their point of view has nothing in common with that of modern scientific Socialism." **

On his part, Bakunin in 1869 vigorously rejected the suggestion that he was a Communist:

> "Because I demand the economic and social equalization of classes and individuals, because * * * I have declared myself in favor of collective property, I have been reproached with being a Communist. What difference, I have been asked, is there between communism and collectivism. * * * I detest communism, because it is the negation of liberty, and I cannot conceive anything human without liberty. I am not a Communist, because communism concentrates and causes all the forces of society to be absorbed by the State, because it necessarily ends in the centralization of property in the hands of the State, while I desire the abolition of the State—the radical extirpation of this principle of the authority and the tutelage of the State, which, under the pretext of moralizing and civilizing men, has until now, enslaved, oppressed, exploited, and depraved them." ***

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* Oscar Jaszi, *Anarchism*, 2 *Encyclopedia of the Social Sciences* 46-53 (1953 ed.).

** Plekhanov, *op cit.*, p. 127.

*** Quoted in Plekhanov, *op. cit.*, pp. 80-81.

The "collectivist" anarchism of Bakunin frankly advocated the necessity of violence to destroy the existing order. His successors, such as Prince Kropotkin and Johann Most, argued that terrorist actions—propaganda of the deed—were important to arouse the imagination of the passive masses. The non-violent, individualistic anarchists taught non-cooperation with the state, refusal to pay taxes, and to perform military service, in order that the system might collapse.*

In this country anarchism was defined by Emma Goldman as "the philosophy of a new social order based on liberty unrestrained by man-made law; the theory that all forms of government rest on violence, and are therefore wrong and harmful, as well as unnecessary."** The reference to "overthrow of existing government in this country" thus probed into a cardinal anarchist canon, the termination of all state power—a proposition which, it need hardly be stated, is anathema to Communists. Compare *United States* v. *Minerich, supra.*

While the Service now vociferously insists that the ends and aims of the Communist Party make a relationship to it relevant to the issue of attachment, it cannot explain why it did not—either in its forms or in its extensive regulations—say so. The answer, of course, is that this discovery is an afterthought fertilized by a changed political climate.

The Court in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 244, held that membership in the Communist Party during the period here in issue could be treated as evidence of political unorthodoxy, but little more. And

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* Jaszi, *op. cit.* See also, Paul H. Douglas, "Proletarian Political Theory", in *A History of Political Theories, Recent Times* (Charles E. Merriam & Harry E. Barnes, eds., The Macmillan Co., N. Y., 1924).

** Quoted in Charles A. Madison, *Anarchism in the United States*, 6 J. of the History of Ideas 46, 62 (1945).

this conclusion is overwhelmingly supported by all available studies. Thus Professor Almond found that the Communist Party's identification with such desirable social and political goals as racial and ethnic equality, economic and social equality, freedom from oppression, pacifism and internationalism, and the Party's approach to trade union and minority group problems, were the most common motives for joining.* He concluded that "The general run of working-class respondents viewed the Party in terms of working-class interests, rather than in terms of the Party's aims."** Another survey likewise found that "The Communist * * * usually * * * thinks of himself as an idealist joining the party because of his hatred of war, poverty, and discrimination or other injustice." ***

These factors played a particularly potent role in the 1930's. As the capitalistic system faltered and the stock market crash lengthened into the great depression, which by 1932 threw almost a quarter of the nation's labor force into unemployment,† the radical economic solution offered by the Communist Party exerted a magnetism that is difficult to comprehend in more prosperous times. The Communist Party manifested itself to the public as a supporter of unemployment compensation, relief, social insurance, industrial unionism, and as an opponent to the incipient fascist threat. The depression also resulted in a change of American attitudes towards the Soviet Union, culminating in the establishment of diplomatic relations, which in turn reflected a degree of prestige on the American Communist Party. In the words of one economic historian:

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* Gabriel A. Almond, *The Appeals of Communism* (1954), pp. 238-240. See, also, Telford Taylor, *Grand Inquest* (1955), pp. 155-159.

** *Ibid.*, p. 392.

*** Morris L. Ernst and David Loth, *Report on the American Communist* (1952), p. 4.

† *Statistical Abstract of the United States* (1956), p. 197.

> "As the nation sank into deep, prolonged depression, and the Soviet Union prospered and experienced a chronic shortage of workers, the political attitude of the greatest capitalist nation toward collectivist Russia became distinctly more favorable. The need for securing Soviet orders hushed business anathemas and altered general economic opinion." *

The Communist Party appeared, moreover, as a lawful political party with candidates on the ballot in most states.** Something of the political climate and intellectual ferment of the period is indicated by the fact that the Communist presidential ticket in 1932 was supported by a League of Professional Groups which included among its members H. W. L. Dana, John Dos Passos, Sidney Hook, Frederick L. Schuman, Sherwood Anderson, Erskine Caldwell, Malcolm Cowley, Waldo Frank, Matthew Josephson, and Edmund Wilson.***

Thus proceedings of this sort—under the guise of relitigating attachment—apply the statute retroactively, in the sense that they introduce elements into the denaturalization process which were no bar to naturalization at the time. This would be improper for due process reasons—wholly apart from the fact that political rights are involved. The threats which such retroactive application poses to political freedom add a special dimension to the problem.

This Court has warned against converting the denaturalization process into a "ready instrument for political persecution." *Knauer* v. *United States, supra; Schneiderman*

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* Broadus Mitchell, *Depression Decade* (1947), p. 293.

** In 1936, for example, the Communist presidential nominee was on the ballot in thirty-five states. *Statistical Abstract of the United States* (1937), p. 159.

*** 75th Cong., 3d Sess., Special Committee on Un-American Activities, House of Representatives, Hearings, *Investigation of Un-American Propaganda Activities in the United States*, Vol. I (1938), pp. 379-380.

v. *United States*, *supra*, at 164.* It is hard to conceive a more compelling indication of extrinsic motivation than the government's attempt to make Communist Party membership retroactively relevant for the qualifications for naturalization.**

The elimination of finality inevitably sows among our foreign-born citizens the fear that for all of their lives they must exercise their political liberties with an eye on the Immigration and Naturalization Service. Though full-fledged citizens in name, they in fact remain political wards of the Department of Justice.

When the government's disregard of the finality of the naturalization judgment and its readiness to improvise and

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* In *Meyer* v. *United States*, 141 F. 2d. 825 (C. A. 5, 1944), Chief Judge Hutcheson commented that this Court had

> "authoritatively rejected the views acted on by some but by no means all of the inferior federal judges and never by the Supreme Court; that naturalized, unlike native born, citizens remain indefinitely under judicial tutelage; that because they are naturalized instead of native born citizens their thoughts and speech are subject to a jealous surveillance, so that in effect their citizenship is held by a tenure no stronger than their ability from time to time to satisfy government inquisitors and judges that their views are, according to accepted formulae, safe and sound."

Judge Hutcheson went on to remind that:

> "United States District Attorneys and United States judges are not given surveillance or inquisitorial powers or suzerainty over the souls and minds of foreign born citizens; and that citizenship once granted him, a naturalized citizen has the same freedom in thinking and speaking as a native born citizen has."

See, also, *Orth* v. *United States*, 142 F. 2d 969 (C. A. 4, 1944), and *United States* v. *Kuhn*, 51 F. Supp. 400 (D. C. Pa., 1943).

** The pleadings in the cases of the *amici curiae* and in this case do not enlighten us as to whether or not the government had knowledge at the time of naturalization of the defendant's alleged Communist Party membership; nor do they tell us when the government discovered the alleged misrepresentation. See *infra*. For all that appears, it may have known about it all along. Compare *United States* v. *Anastasio*, 226 F. 2d 912 (C. A. 3).

retroactively impose new political qualifications are coupled with its insistence that lapse of time and lack of due diligence in seeking relief are no defense against denaturalization (see *infra*), it becomes painfully apparent that the whole denaturalization process has really been eliminated from the rule of law. See *United States v. Anastasio, supra.* Thus it becomes possible—if not inevitable—that the targets of denaturalization will be those whose differences with the administration in power make their harassment politically lucrative. Denaturalization becomes a means not of curing fraud, but of punishing dissent * beginning with those who are active in politically unorthodox movements and widening in scope to engulf trade union leaders, until it finally reaches little people who invite reprisal because of their refusal to renounce their political beliefs, to act as informers or otherwise to "cooperate" with the Department of Justice. ** Not to put too fine a point on it—denaturalizations of the kind involved here are purges masquerading as legal proceedings.***

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* This selective process under which particular individuals are singled out for denaturalization because they are deemed to be presently subversive converts what is in form an action for the rescission of a status into a criminal trial for subversion.

** We have never encountered a case of an attempted denaturalization of a renegade or recanted communist. Consider Maurice Malkin, an ex-Communist who is employed as a professional witness by the Immigration and Naturalization Service. Malkin, in the course of his many appearances on the witness stand, has admitted that he lied in his application for naturalization. Yet, as far as we know, no proceeding has ever been instituted to denaturalize him.

*** The Government can hardly dispute this. On June 18, 1956, Senator James O. Eastland, chairman of the Senate Internal Security Subcommittee, wrote to the Department of Justice demanding the prompt denaturalization and deportation of four labor leaders—all of them *amici curiae* here. The Department replied on June 26 that "the Department of Justice has been vigorously pursuing proceedings designed to denaturalize and deport any naturalized citizen whose presence in the United States may constitute a threat to internal security." (Department of Justice Press Release, June 27, 1956.)

The abandonment of finality is poisonous to political liberty because it results in censorship of political expression and invites discrimination in the enforcement of the denaturalization statute on political grounds *—a counterpart of the very evil which the statute was framed to prevent.

B. Relitigation of Findings of Attachment Creates Insuperable Difficulties and Hardships for a Defendant.

Petitioner came to this country in 1913 at the age of ten. He became a naturalized citizen in 1938. The denaturalization complaint was filed at the close of 1952. As the Appendix shows, those on whose behalf this brief is filed have lived in this country for periods of time ranging from thirty to more than fifty years. In a great many instances they arrived here in their infancy with no conscious attachment to any other land or sovereign. On an average, a generation has elapsed since they obtained their certificates of citizenship. They have married here and raised families, whose members have acquired derivative citizenship. Parents and children have served in the armed forces. The structure of their lives is bound together by the fact of citizenship and the judgment which granted it.

What is involved is not denaturalization alone, for the cancellation proceeding is but a precurser to deportation. These individuals are thus threatened with the possible uprooting of their lives because the commitment to citizenship upon which they had staked all is now, years later, claimed to be compromised by perjury and fraud. This claim must be rejected by a court of equity because, though not asked to choose between their political views and their

* See, for example, *Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *Winters* v. *New York*, 337 U. S. 507, 518-519; *Near* v. *Minnesota*, 283 U. S. 697, 712; *Thornhill* v. *Alabama*, 310 U. S. 88, 100-101.

aspiration for citizenship, they are now, in their declining years, with diminished earning power and long-parted ties to other lands, being penalized for having chosen wrongly. And even if they were in fact asked to choose and chose wrongly, can it be doubted that the possible loss to the naturalized citizen because of the changes in his personal life is far greater today than it would have been had the government acted promptly? By delaying its remedy until a time when its success would result in a loss to the defendant far greater than it would have been had the government pursued its remedy with dispatch, the government forfeits its right to equitable relief. See *Restatement of Judgments*, Section 129 and *Comments*.

Added to these hardships created by the passage of time are the difficulties of relitigating the defendant's attachment and allegance. Consider the relative position of the parties when the government comes to court. In almost all of these cases the government relies upon testimony of professional witnesses who are employed by the Immigration and Naturalization Service. These witnesses boast memories which, like wine and cheese, improve with age. They fly backward in time with the greatest of ease to remember that a particular defendant addressed a Communist official as "Comrade" on a morning in May thirty years ago; or that another defendant confided to him the most blood-thirsty determination to overthrow the government at the very time in 1938 that he was applying for naturalization.

These same witnesses are testimonial maids of all work. They also function as experts to testify that the Communist Party intended to overthrow the government by force and violence during the years in issue—whatever they may happen to be, and that the Marxist-Leninist books which the government introduces in evidence were required reading for all, including the defendant, so that he must have known of the subversive goals of the organization.

How is such a witness to be cross-examined? And how is the defendant to prepare his defense case? There is a great likelihood that in many instances his own two witnesses who vouched for him are either dead or intimidated into silence. Since they themselves are likely to be naturalized citizens, it is difficult to ask them to risk their own citizenship by coming again to the defense of the loyalty of the individual now subject to denaturalization. If the witnesses are alive and available to take the stand, they lack the government witnesses' mnemonic skills and are too honest to "remember" facts concerning the applicant's political views and affiliations long ago.

And how is the applicant himself to prove his attachment to the principles of the Constitution? The difficulties of proving in a contemporaneous proceeding a proposition so subjective* are multiplied by the burden which requires a witness to prove that twenty or thirty years ago he told the truth when he swore that he was attached to the principles of the Constitution. How to bring to life after a generation a dream that was spacious enough to embrace both adherence to democratic ideals and a belief in socialism; both the longing for a better world, borne of a hatred of the injustice and exploitation which the alien carried with him from his native country, and the belief in the institutions of democracy? How can he explain that the phrase "attachment to the principles of the Constitution" was not a formula of rigid content sanctifying the *status quo* against which he could check point by point his own beliefs and commitments, but rather a broad assurance of democracy and freedom embracing divergent viewpoints? Where is he to find the night school teachers who, in collaboration with the Immigration and Naturalization Service, prepared him for citizenship and explained to

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* Cf. *United States* v. *Lattimore*, 215 F. 2d 847 (App. D. C.), and see *Schneiderman* v. *United States*, *supra*. Compare *Schwimmer* v. *United States*, 279 U. S. 644, with *Girouard* v. *United States*, 328 U. S. 61.

him what the Constitution meant and how it differs in theory and in substance from the oppressive laws which had driven him to find a new home? Where is he to find the examiner who took him step by step through the naturalization process? *

Finally, where is the advocate resourceful enough to undertake a task, beyond the skill and competence of most historians, to portray an era not as it appeared to those who came after it, but as it was felt and lived by those who were a part of it? How to convert into evidence those subtle and imponderable factors which make a political philosophy acceptable in one period of history and anathema in another? ** And how to essay the even more difficult task of demonstrating to a court through witnesses the impact of that era upon his own consciousness and convictions?

One would be blind to reality to deny that the government's unexplained delay in pursuing its remedy has so

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* As Judge Hand pointed out long ago in *In re Denny*, 240 Fed. 845, 846, applicants for citizenship are "a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation."

** In reversing the district court's cancellation order on December 5, 1957 in the case of Anthony Minerich, one of the *amici* herein, the Court of Appeals for the Seventh Circuit had the following to say concerning the political hindsight which is involved in these matters:

> "Though communism is now recognized as an enemy ideology, contemporary recognition finally became crystallized in official circles of our government at a comparatively late date."

It added:

> "A political decision here based on hindsight would infect the judicial processes of our free society faster than tolerating retention of a probably undeserved privilege of citizenship * * *."

increased the likelihood of error * as to require the withholding of relief. Nor is it an answer to any of our contentions to assure the defendant in a case of this sort that the government must carry a weighty burden of proof. The evils of which we complain flow from the usurpation of the power to impeach a judgment. Nothing short of restoring the naturalization judgment itself to the rule of law will cure them.

III

The "Speiser affidavit" is not an affidavit of good cause.

Petitioner's brief discusses in detail the "procedural" aspects of the affidavit of good cause: ** the extent to which it fails to conform to proper evidentiary standards and the lack of specificity of the allegations set forth therein. We confine ourselves here, therefore, to the contention that certain indispensable allegations are omitted altogether.

It need not be extensively argued that the requirement of an affidavit of good cause is specifically imposed upon the denaturalization proceeding as an indispensable "prerequisite" (*United States* v. *Zucca*, 351 U. S. 91) to the commencement of the proceeding. Because the cancellation process involves an attack upon a judgment, Congress required that the supporting averments duplicate those attached to (or sometimes embodied in) the bill of review in equity for relief against a judgment after the lapse of the term. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248.

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* See *Restatement of Judgments, Comments* on Section 129(b).

** There is involved here the so-called "Speiser affidavit", similar in form and authorship to those attached to the denaturalization complaints issued against the *amici*.

But the "Speiser affidavit" assumes that no judgment is involved and disregards all of the established requirements imposed by equity for impeaching a judgment out of term on the ground of fraud. A brief glance at the affidavit will readily reveal that, despite the intention of Congress to the contrary, the government views this proceeding as no different from any action in fraud where no judgment is involved. This becomes quite clear when we compare the complaint and the affidavit. To all material intents and purposes they are indistinguishable from one another.

But such an affidavit literally is not an affidavit of good cause, for it expresses no good cause why the judgment should be reopened. We must note at the outset that we are in an area in which pleading requirements are strict and precise. See *Wood* v. *Carpenter,* 101 U. S. 135, 140; *United States* v. *Stinson,* 197 U. S. 200; 7 Moore, *Federal Practice,* Section 60.37 [1]. More than this, the affidavit of good cause in a denaturalization proceeding is a Cerberus which guards citizenship with a jealous vigilance. See *United States* v. *Zucca, supra.* An affidavit seeking relief from a judgment of naturalization must contain:

(1) A statement of the judgment sought to be impeached or a summary of it. *Dexter* v. *Arnold,* Fed. Cas. No. 3856, 5 Mason 303.

(2) Allegations charging something more than misrepresentation or perjury. The "acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." *United States* v. *Throckmorton, supra,* at 65; *Restatement of Judgments,* Section 118; 2 Pomeroy, *Equitable Remedies* (1905), Secs. 648-649; *Freeman on Judgments* (5th ed., 1925), Sec. 204.

(3) An allegation that the plaintiff did not know the facts involved in the misrepresentation and was therefore deceived. See *United States* v. *Anastasio, supra,* at 917, and cases cited in footnote 14, and *United States* v. *Salomon,* 231 Fed. 929 (C. A. 5).

(4) The precise way in which the plaintiff was injured by the misrepresentation, *i.e.,* how the outcome would have been different had the misrepresentation not been made. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 421-422.

(5) "Especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether, by ordinary diligence, the discovery might not have been before made." Quoted in *Wood* v. *Carpenter, supra,* at 140. See also *Restatement of Judgments,* Section 129(b).

The affidavit here in issue lacks all of these allegations demanded by equity as evidence of good cause for the impeachment of a judgment. These allegations cannot be waived;* the affidavit is totally defective.**

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* Indeed, even if the fraud allegations were adequate, the silence of the affidavit with respect to time factors, due diligence and prompt judicial recourse after discovery, would alone condemn it. See *Restatement of Judgments,* Sections 118 and 129.

** As we have seen, the Court has heretofore treated as "jurisdictional" in some constructive sense omissions by the applicant for naturalization of a far less basic character. See, for example, *United States* v. *Ness, supra.* The failure of the government to make the allegations which we have discussed is, we believe, more clearly jurisdictional in the true sense, for the court has no power to reopen the judgment without them and its power to act upon the original proceeding has long since lapsed. It cannot be the law that technical defects and procedural irregularities in the naturalization proceeding are jurisdictional, while the disregard of allegations of good cause in the denaturalization affidavit is not.

CONCLUSION

Established principles of equity, as well as basic constitutional rights of free speech and thought, require that the complaint be dismissed.

Respectfully submitted,

FRANK DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York 17, New York,
Attorneys for Amici Curiae.

Isidore Begun
Daniel Boano
Louis J. Braverman
Arthur Bartl
Joseph Chandler
Charles A. Collins
Richard Lawrence Davis
Anna Devunich
Stephen Devunich
Freeda Diamond
David Diamond
Sarah Finkel
Leo Fisher
Max Hatturg
Victor Jeremy Jerome
James Lustig
Salvatore Lauranti
James J. Matles
Celia Feller Miller
Anthony Minerich
Steve Nelson
Paul Novick
Gunnar Paulson
Clara Paulson
Sol Almazov Pearl
Constantine Radzie
Alex Roth Rakosi
Al Richmond
Isaac E. Ronch
Allan Ross
James E. Toback
Louis Weinstock

APPENDIX

Name	Birth Date	Year of Arrival in U. S.	Year of Naturalization	Children
Isidore Begun	1903	1904	1925	0
Daniel Boano	1905	1911	1945	0
Louis J. Braverman	1900	1914	1931	0
Arthur Bartl	1912	1930	1944	4
Joseph Chandler	1906	1923	1943	4
Charles A. Collins	1906	1924	1939	2
Richard Lawrence Davis	1911	1927	1944	1
Anna Devunich	1908	1927	1944	0
Stephen Devunich	1899	1927	1942	0
Freeda Diamond		1910	1943	2
David Diamond	1892	1910	1943	2
Sarah Finkel	1896	1906	1944	2
Leo Fisher	1897	1903	1945	0
Max Hatturg	1896	1927	1935	3
Victor Jeremy Jerome	1896	1915	1928	3
James Lustig	1902	1921	1928	1
Salvatore Lauranti	1903	1906	1941	8
James J. Matles	1909	1929	1934	1
Celia Feller Miller	1900	1913	1944	1
Anthony Minerich	1903	1905	1928	
Steve Nelson	1903	1920	1928	2
Paul Novick	1891	1920	1927	1
Gunnar Paulson	1899	1922	1944	0
Clara Paulson	1898	1907	1945	0
Sol Almazov Pearl	1895	1922	1944	0
Constantine Radzie	1896	1913	1939	0
Alex Roth Rakosi	1907	1923	1940	2
Al Richmond	1913	1915	1943	2
Isaac E. Ronch	1897	1913	1935	1
Allan Ross	1907	1922	1940	3
James E. Toback	1901	1906	1944	0
Louis Weinstock	1903	1924	1930	2